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NATIONAL BANK CASES,
CONTAINING
ALL DECISIONS
OF BOTH
THE FEDERAL AND STATE COURTS
RELATING TO
NATIONAL BANKS,
From 1878 to 1880.
ALSO THE
ACTS RELATING TO NATIONAL BANKS.
WITH
NOTES AND REFERENCES
BY IRVING BROWNE,
EDITOR OF "THE ALBANY LAW JOURNAL" AND "THE AMERICAN REPORTS."

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PREFACE.

This volume is designed as a continuation of Thompson's National Bank Cases, and is believed to contain every such case decided since the issue of that volume, including a number reported while this volume was in press. Many of these decisions are of the greatest authority and importance, especially on questions of taxation, usury, and liability for special deposits. To these have been added the National Bank Act, with the various amendments, and other acts relating to National banks, with sectional references to the decisions reported in this volume and in Mr. Thompson's work, and a detailed index.

For official copies of these acts the undersigned is indebted to the courtesy of Hon. John J. Knox, Comptroller of the Currency.

IRVING BROWNE.

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CASES DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HAYWARD V. ELIOT NATIONAL BANK.

(96 U. S. 611.)

Sale by National bank to directors of corporate stock held as collateral for loans, when valid.

H. being indebted to a National bank for a considerable sum, for which the bank held certain corporate stock as collateral security, in writing authorized the president and directors of the bank to sell at their discretion all the stock and apply the proceeds of the sale upon his indebtedness. Thereafter, after giving H. ample notice of an intention to sell, the stock was sold and transferred to three of the directors of the bank, at a price above the market value, and the amount received from the sale applied upon the indebtedness of H. H. received an itemized statement of the proceeds of the sale and of its application upon his indebtedness, to all of which he made no objection. Five years thereafter, H. commenced an action against the bank for the purpose of obtaining a decree redeeming the stock, and for an accounting. *Held*, that the action could not be maintained: first, because by his silence he was estopped; and second, because of delay in bringing suit.

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

In the year 1863 Hayward, the appellant, "for the purpose of opening a credit with the Eliot Bank," a corporation created under the laws of Massachusetts, deposited certain securities with that bank with power to transfer the same, as well as any bullion, coin, or other securities which he might thereafter deposit with the bank. He expressly waived in the writing then executed, "all and every objection to the manner in which said securities may be sold, whether at public or private sale, or at the board of brokers, without any demand or notice whatever." Subsequently the bank was converted into a National banking association, under the name of the Eliot National Bank, and in the latter capacity, in October, 1866, it loaned to Hayward, first \$6,500 and then \$20,000, receiving in pledge, as security for the loan, 450 shares of stock in the Hecla Mining Company, incorporated under the laws of Michigan, but having an office in the city of Boston. The loans were understood at the time by both parties to be merely temporary, to go upon the demand-loan account of the bank, and to be promptly paid. In order that the bank might have full control of the security, Hayward caused the pledged stock to be transferred to R. B. Conant, to whom, as cashier of the bank, certificates, absolute in form, were issued for the whole 450 shares. Hayward did not meet the loans as he had agreed, but made provision for the interest up to April 1, 1867. After that date he paid no interest. During the year 1867 various assessments were made by the company upon its stock. Hayward was notified of and requested to meet them, but he failed to do so, and the bank, in order to save the security, and for its own indemnity, was compelled to pay the assessments, amounting in the aggregate to \$9,972.15.

On the 9th November, 1867, Hayward executed and delivered to the bank the following paper:

"BOSTON, Nov. 9th, 1867.

I hereby authorize the president and directors of the Eliot National Bank to sell, at their discretion, 450 shares of stock of the Hecla Mining Company,

Hayward v. Eliot National Bank.

held as collateral security for loan, proceeds of sale to be applied upon said loan.

To the President and Directors of the Eliot Bank.

CHAS. L. HAYWARD."

This paper was obtained because it was doubtful whether the power of attorney given in 1863, when the bank was a State institution, was sufficient to authorize a sale of the stock by the National bank to pay Hayward's indebtedness to it.

After the transfer in October, 1866, the stock was at times greatly depressed in value, the market price ranging from \$15 to \$70 per share, the latter being the ruling price in August, 1868. But even that price was insufficient to reimburse the bank for its loan and interest and for assessments on stock it had paid. The board of directors, on the 18th August, 1868, passed an order declaring that unless Hayward paid \$5,000 during that week, and a like amount the following week, upon his loans secured by the Hecla mining stock as collateral, the president was directed to sell the same forthwith. Of this order Hayward was notified, but he did not comply with its terms. Thereupon the president of the bank determined to dispose of the stock in discharge of the bank's claim. Three of the directors, for the purpose, as the bank officers say, of preventing loss to the bank in which they were stockholders, but for the further reason, doubtless, that they regarded it a safe investment, proposed to the bank to take the stock at \$87 per share, which was above the market price, each director to take 150 shares and pay one-third of Hayward's indebtedness to the bank. But before the directors would consummate this arrangement, they insisted that Hayward be advised of their proposition. The sale was consummated on the 8th September, 1868, and on that day each of the directors paid, by assuming absolutely, one-third of the bank's claim against Hayward, and received in consideration thereof a new certificate for 150 shares of stock.

Immediately after this sale, the bank sent to Hayward a statement of his account, showing its claim against him on account of his loans, interest, and assessments paid to be \$39,257.16, and closing with this credit: "Sept. 8, 1868, by cash, \$39,257.16."

Hayward v. Elliot National Bank.

In 1871 the Hecla Mining Company and the Calumet Mining Company, also a Michigan corporation, were consolidated under the name of the Calumet and Hecla Mining Company. New stock was issued from time to time, and at the commencement of this action, instead of the 450 shares originally held, the three directors hold in the aggregate 900 shares in the consolidated company. After the transfer of September 8, 1868, they met all assessments upon the stock, and received, individually, such dividends as were declared thereon.

Other facts are stated in the opinion of the court.

This action was instituted by Hayward against the bank, on the 14th March, 1872, for the purpose of obtaining a decree redeeming the stock, and requiring the bank to transfer to him the 900 shares of the stock of the Calumet and Hecla Mining Company, and to pay over whatever might be due him, upon taking account of the moneys received on account of the stock, and the amounts due the bank from him.

Neither the mining company, nor the directors who purchased the stock, were made defendants.

The bill was dismissed, and from that decree this appeal is taken.

HARLAN, J. 1. This bill seems to have been prepared upon the supposition that the bank then held and owned the 900 shares of stock in the Calumet and Hecla Mining Company at the commencement of this action. It is evident, however, that the bank's connection with the stock ceased September 8, 1868, when it was sold to three of the bank directors. After that date the purchasers claimed and controlled the stock as their individual property, and their ownership was uniformly recognized both by the bank and the mining company. They paid all assessments laid, and received all dividends declared, after September 8, 1868. The evidence shows that the sale to them was absolute and unconditional. The title unquestionably passed to them, and if the appellant is entitled, upon any ground whatever, to a transfer of the stock, such relief can only be given in an action against those who hold it and are recognized by the mining company as its owners.

2. A large portion of the very elaborate argument made in behalf of the appellant was in support of the proposition that the bank having received the stock in pledge to secure his indebtedness to it, could not, consistently with settled principles, buy from itself, and consequently could not sell to its directors. If these general principles were at all applicable in a case like this it would only prove that the bank, by violating its duty, had become liable to him for the value of the stock. But such liability is not charged, nor is such relief asked in the bill. The specific relief sought is a decree requiring the bank to transfer the stock to him — a thing now beyond its power to do. It is true that the bill contains a general prayer for such relief as may be consistent with equity and good conscience, but we incline to the opinion that its whole frame and structure are inconsistent with a right in this action to a decree for the value of the stock, even if the facts justified any such relief. 1 Dan. Ch. Pr. (3d Am. ed.) 382; *Chalmers v. Chambers*, 6 Har. & Johns. 29; *Hobson v. Mo-Arthur*, 16 Pet. 182; *English v. Foxall*, 2 id. 595; *Thompson v. Smith*, 7 Port. 144; *Dwoner v. Fortner*, 5 id. 10; *Strange v. Wilson*, 11 Ala. 324.

3. But waiving the consideration last mentioned, we discover nothing in the evidence which would entitle Hayward to a decree against the bank in any form of proceeding. The bank had the unquestionable right to sell the stock in satisfaction of his indebtedness. It is equally clear, that with his assent, the stock could have been taken by the bank in discharge of such indebtedness, or sold to any of its directors. Where such assent is clearly shown, and the sale to them was unattended by circumstances of fraud, unfairness, or imposition, we perceive no sound reason why it should not be upheld, especially after an unreasonable and unexplained lapse of time, without objection or complaint by the pledgor. Prior to the sale of the stock, Hayward was often requested by the bank to take up his notes, and to meet the assessments upon the stock. He failed to do either, and the bank was compelled to provide for the assessments. The indulgence extended to him by the bank was characterized by the utmost liberality. It was all that Hayward could have expected or demanded. When,

Hayward v. Eliot National Bank.

therefore, he was informed, as we do not doubt he was, of the settled purpose of the bank to sell the stock, and of the proposition of the three directors to purchase it, it was his duty, if he disapproved of the latter arrangement, to give expression, in some form, to that disapproval. So far from expressing disapproval, the weight of the evidence is that he gave his consent. It is quite certain that the directors made the purchase in the belief that he had been advised of their proposition, and had assented to its acceptance by the bank. The most favorable construction for him which can be put upon the evidence is, that he was silent when notified of the proposition, and made no objection to its acceptance. His silence, however, under the circumstances, taken in connection with his subsequent conduct, should be held as conclusive as if he had originally assented, in express terms, to the sale. If it be suggested, that after being informed of the proposition of the directors, sufficient time was not allowed him for deliberation before the sale was made, and if, for that reason, he could have repudiated the sale and reclaimed the stock, there is still no satisfactory explanation of his course after he learned that a sale had actually occurred. He was promptly advised of it and of the amount realized therefrom. He received, at the same time, an itemized account, showing the amount claimed by the bank upon the original loans, as well as for interest and for its advances to meet assessments. That account, it is true, contained no statement, in terms, of the sale of the stock, nor did it give the names of the purchasers. But he admits, in his cross-examination, that he was informed by the person who delivered the account that the stock had been sold, and that he understood the credit of \$39,257.16 to denote the sum realized from such sale. There was no other mode, as he well knew, by which he could become entitled to so large a credit. He disputed no item in the account, expressed no disapproval of what had been done, made no complaint to the bank of its action. Although he was well acquainted with the bank officers, and met them frequently after the sale, often upon terms of familiar intercourse, he made no inquiry about the stock. He gave no intimation either of dissatisfaction or of any purpose to repudiate the sale, and look to the

bank for the value of the stock. He says that he felt "too cast-away to speak to anybody; * * * couldn't help himself, nor pay the loan; cared very little about any thing." If he was entitled to repudiate the sale as soon as notified of it, and compel the bank to recover the stock, such a course would have profited him nothing, since the three directors paid more than the stock was at the time worth, and since, also, the bank, under its express authority to sell, could have put it at once upon the market. It was this consideration which perhaps induced him to remain silent and inactive for more than three years and a half after the sale. During all that period he neither paid, nor offered to pay, any interest to the bank, although his present suit rests upon the basis that the bank had all the time an unsettled account with him, embracing an actual subsisting debt, upon which, he now concedes, it is entitled to interest. For three years and a half he permitted the bank officers and the purchasing directors to act in the belief that he was content with their action, and that the money realized from the sale had been properly applied to the payment of his indebtedness. Although conversant all the time of the market value of such stock, he made no demand upon the mining company for dividends declared, nor did he protest against the payment of them to others. Finally, the extraordinary advance in the market price of the stock caused him to break the silence which he had so long and so persistently maintained, and in March, 1872, he formally notified the *bank* of his desire and purpose to redeem the stock, although he knew, or could have ascertained by the slightest diligence, upon inquiry either at the bank or the office of the mining company in Boston, that the bank had not held or controlled the stock in any form, directly or indirectly, after the sale in September, 1868.

The facts present insuperable obstacles to any decree in favor of the appellant. If the sale made by the bank was originally impeachable by Hayward, the right to question its validity was lost by acquiescence upon his part. He was in a condition, immediately after the sale, to enforce such rights as the law gave him. He was fully apprised of the nature of those rights, and of all the material facts of the case. He now claims that the sale was in deroga-

tion of his rights and injurious to his interests, and yet his conduct was uniformly inconsistent with any purpose to repudiate the sale or assert ownership of the stock. His course was continuously such as to induce a reasonable belief of his fixed determination to abide by the action of the bank. He remained silent when he should have spoken. He will not be heard now, when he should be silent. He must be held to have waived and abandoned the right, if any he had, to impeach the transaction of September 8, 1868.

4. But the appellant is equally concluded by the lapse of time during which that transaction has been allowed to stand, without any effort upon his part to impeach it. It must now be regarded as unimpeachable.

Courts of equity often treat lapse of time, less than that prescribed by the statute of limitation, as a presumptive bar, on the ground "of discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right." 2 Story's Eq. Jur., § 1,520. In *Smith v. Clay*, Ambler, 645, Lord CAMDEN said: "A court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, when the party has slept upon his right, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced." These doctrines have received the approval of this court in numerous cases. *Badger v. Badger*, 2 Wall. 294; *Marsh v. Whitmore*, 21 id. 178; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 592; *Harwood v. Railroad Co.*, 17 Wall. 81. In the last-named case this court said that, without reference to any statute of limitation, equity has adopted the principle that the delay which will defeat a recovery must depend upon the particular circumstances of each case. The question of acquiescence or delay may often be controlled by the nature of the property which is the subject of litigation. "A delay which might have been of no consequence in an ordinary case may be amply sufficient to bar relief when the property is of a speculative character, or is subject to contingencies, or where the

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rights and liabilities of others have been in the mean time varied. If the property is of a speculative or precarious nature it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage." Kerr on Mistake and Fraud (Bump's ed.), 306, 302; 91 U. S. 592.

If Hayward was defrauded of his stock — if the title did not pass from him or the bank because of the peculiar relations which the purchasers held to him and to the property — if he had the right originally upon any ground to repudiate the sale and reclaim the stock, it was incumbent upon him, by every consideration of fairness, to act with diligence, and before any material change in the circumstances and in the value of the stock had intervened. No sufficient reason is given for the delay in suing. His property or pecuniary embarrassment was not a sufficient excuse for postponing the assertion of his rights. He should be deemed to have made a final election not to disturb the sale of 1868, and a court of equity should not permit him, under the circumstances, to recall that election. Upon the grounds, then, both of acquiescence and lapse of time, he should be held to have forfeited all right to relief in a court of equity.

For the reasons given, and without discussing other questions of minor importance, the decree should be affirmed. And it is so ordered.

WHEELER V. UNION NATIONAL BANK OF PITTSBURG.

(96 U. S. 785.)

National Currency Act — Construction of: liberal forfeitures not favored.

The National Currency Act should be liberally construed to effect the ends for which it was passed, but a forfeiture under its provisions should not be declared unless the facts upon which it rests are clearly established. In case of a claim of forfeiture against a bank for taking unlawful interest upon the discount of bills of exchange payable at another place, it should appear

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affirmatively that the bank knowingly received or reserved an amount in excess of the statutory rate of interest and the current exchange for sight drafts. Accordingly, where it was not shown what the rate of exchange was, a charge of one-quarter of one per cent in addition to the statutory rate of interest would not be sufficient to authorize a forfeiture.

IN error to the Superior Court of the city and county of New York. The opinion states the case.

HARLAN, J. The controlling question presented in this case for our determination involves the construction of the National Currency Act of June 3, 1864, which declares that "the knowingly taking, receiving, reserving, or charging a rate of interest greater" than that "allowed by the laws of the State or Territory where the bank is located," shall be "held and adjudged a forfeiture of the entire interest which the bill, note, or other evidence of debt carries with it, or which has been agreed to be paid thereon." 13 Stat. 108. The same section also declares: "But the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest." 13 Stat. 108.

Wheeler, the plaintiff in error, was sued as indorser upon two bills of exchange, drawn at Brady's Bend, Pennsylvania, payable sixty days after date at the American Exchange Bank, in New York, and discounted by the Union National Bank of Pittsburg for the benefit of the Brady's Bend Iron Company, a corporation created under the laws of Pennsylvania. Wheeler claims that the bank, under the provisions of the statute, forfeited the entire interest which the bills carried, or which was agreed to be paid. This claim was denied, first in the Superior Court for the city and county of New York, where this action was commenced, and subsequently, in the Court of Appeals of that State.

No question having been raised as to the *bona fide* character of the bills, the bank had, by the express words of the statute, the right to charge and receive the current rate of exchange for sight drafts in addition to interest at the rate of six per cent, per annum, which is the rate fixed by general statute in the State of Pennsyl-

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vania. But upon examining the special finding of facts upon which the State court based its judgment, we discover no evidence of the current rate of exchange at the date of discount. That exchange was in fact charged, cannot be gainsayed by Wheeler, since he avers, in his answer, that the bills were discounted under an usurious agreement that the bank should receive, in addition to certain interest, in excess of the statutory rate, commissions or exchange of one-quarter of one per cent. No such agreement was, however, proven. Indeed, the record furnishes no evidence of any distinct agreement either as to the amount of interest or exchange to be reserved by the bank upon discounting the bills. Nothing seems to have been said at the time of discount as to the amount to be reserved by way of interest or upon the subject of exchange, and the court refused, upon the request of Wheeler, to find it as a fact in the case, that "no exchange was charged." While it may be inferred that exchange was charged by the bank, we are uninformed by the record whether it exceeded the current rate for sight drafts.

The statute should be liberally construed to effect the ends for which it was passed, but a forfeiture under its provisions should not be declared unless the facts upon which it must rest are clearly established. It should appear affirmatively that the bank knowingly received or reserved an amount in excess of the statutory rate of interest, *and* the current exchange for sight drafts. There is no proof of the rate of exchange, and since the courts uniformly incline against the declaration of a forfeiture, the party seeking such declaration should be held to make convincing proof of every fact essential to forfeiture.

It is unnecessary to consider any other question in the case. The judgment must be affirmed.

UNION NATIONAL BANK, SKINKER AND OTHERS V. MATTHEWS.

(98 U. S. 658.)

Loan on real security not void.

A National bank loaned money and took as security therefor an assignment of a note and deed of trust of real estate. *Held*, that the deed of trust was not void and that the bank would not be enjoined from selling thereunder. While a National bank is prohibited by law from loaning money on real security, yet if it does make a loan on such security the security is not void but may be enforced.*

IN error to the Supreme Court of the State of Missouri. Bill for an injunction to restrain the sale of real estate. The opinion states the case.

SWAYNE, J. This case involves a question arising under the National Banking Law, which has not heretofore been passed upon by this court. We have considered it with the care due to its importance. There is no controversy about the facts, and so far as it is necessary to advert to them, they may be briefly stated.

On the 1st of March, 1871, Hugh B. Logan and the defendant in error, Elizabeth Beard, executed and delivered to Sterling, Price & Co., their joint and several promissory note for the sum of \$15,000, payable to the order of that firm two years from date, with interest at the rate of ten per centum per annum. The payment of the note was secured by a deed of trust, executed by the defendant in error, of certain real estate therein described.

On the 13th of the same month, the note and deed of trust were assigned to the bank. The answer of the bank avers that the bank "accepted the said note and deed of trust as security for the sum of \$15,000, then and there advanced and loaned to said Sterling, Price & Co., * * * on the security of said note and deed of trust." Price & Co. failed to pay the loan at maturity. The bank directed the trustee in the deed of trust to sell. The defendant in error thereupon filed this bill in the proper State

* Reversing *Matthews v. Skinker*, Thomp. N. B. Cas. 647. Overruling *Woods v. People's Nat. Bank of Pittsburgh*, 83 Penn St. 57; Thomp. N. B. Cas. 888, and cases cited in note thereto.

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court to enjoin the sale. A perpetual injunction was decreed upon the ground that the loan by the bank to Price & Co. was made upon real estate security; that it was forbidden by law, and that the deed of trust was therefore void. The decree was made upon the pleadings. No testimony was introduced upon either side. The plaintiffs in error removed the case to the Supreme Court of the State. There the decree of the lower court was affirmed. Hence this writ of error.

Our attention has been called to but a single point which requires consideration, and that is whether the deed of trust can be enforced for the benefit of the bank.

The statutory provisions which bear upon the subject are as follows:

"SEC. 5136. Every National banking association is authorized "to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, *by loaning money on personal security*, and by obtaining, issuing and circulating notes according to the provisions of this title."

"SEC. 5137. A National banking association may purchase, hold and convey real estate for the following purposes and no others: First, such as may be necessary for its immediate accommodation in the transaction of its business. Second, such as may be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts to it. But no such association shall hold the possession of any real estate purchased to secure any debts due to it for a longer period than five years." Rev. Stat. U. S. 1999; 13 U. S. Stat. at Large, 99.

Here the bank never had any title, legal or equitable, to the real estate in question. It may acquire a title by purchasing at a sale under the deed of trust, but that has not yet occurred, and never may.

Section 5137 has, therefore, no direct application to the case. It is only material as throwing light upon the point to be considered in the preceding section. Except for that purpose it may be laid out of view.

Section 5136 does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed. As the transaction is disclosed in the record, the loan was made upon the note as well as the deed of trust. *Non constat* that the maker who executed the deed would not have been deemed abundantly sufficient without the further security. The deed, as a mortgage would have been, was an incident to the note, and a right to the benefit of the deed, whether mentioned or delivered or not, when the note was assigned, would have passed with the note to the transferee of the latter.

The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations, and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in *mortmain*. The intent, not the letter of the statute, constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances the defense of *ultra vires*, if it can be made, does not address itself favorably to the mind of the Chancellor. We find nothing in the record touching the deed of trust, which, in our judgment, brings it within the letter of the meaning of the prohibitions relied upon by the counsel for the defendant in error.

In *First National Bank v. Haire*, 36 Iowa, 443, Thomp. N. B. Cas. 480, the bank refused to discount a note for a firm, but agreed that one of the partners might execute a note to the other, that the payee should indorse it, that the bank should discount it, and that the maker should indemnify the indorser by a bond and mortgage upon sufficient real estate executed for that purpose, with a stipulation that in default of due payment of the note, the bond and mortgage should inure to the benefit of the bank. The arrangement was carried out. The note was not paid. The maker and indorser failed and became bankrupts. The bank filed a bill to foreclose. The same defense was set up as here. In disposing of this point the Supreme Court of the State said:

"Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors, and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this. *Silver Lake Bank v. North*, 4 Johns. Ch. 370."

But it is alleged by the learned counsel for the defendant in error that in the jurisprudence of Missouri a deed of trust is the same thing in effect as a direct mortgage—with respect to a party entitled to the benefit of the security—and authorities are cited in support of the proposition. The opinion of the Supreme Court of Missouri assumes that the loan was made upon real estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not *declare* such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so, and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.

In *Harris v. Runnels*, 12 How. 79, this court said that "the statute must be examined as a whole to find out whether or not the makers meant that a contract in contravention of it was to be void, so as not to be enforced in a court of justice." In that case a note given for the purchase-money of slaves, taken into Mississippi contrary to a statute of the State, was held to be valid.

Where a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid, but the penalty attaches to the officer who did the prohibited act. *Milford v. Worcester*, 7

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Mass. 48; *Parton v. Hervey*, 1 Gray, 119; *King v. Birmingham*, 8 B. & C. 29.

Where a bank is limited by its charter to a specified rate of interest, but no penal consequence is denounced for taking more, it has been held that a contract for more is not wholly void. *Bank of the State of Mississippi v. Sharp*, 4 Smedes & Mar. 75; *Grand Gulf Bank v. Archer*, 8 id. 151; *Rock River Bank v. Sherwood*, 10 Wis. 230.

The charter of a savings institution required that its funds should be "invested in or loaned on *public stocks or private mortgages*," etc. A loan was made and a note taken secured by a pledge of worthless bank stock. The borrower sought to enjoin the collection of the note upon the ground that the transaction was forbidden by the charter, and therefore void. The court held the borrower bound, and upon a counter-claim adjudged that he should pay the amount of the loan with interest. *Mott v. U. S. Trust Co.*, 19 Barb. 568.

Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid unless assailed in a direct proceeding instituted for that purpose. *Leazure v. Hillegas*, 7 S. & R. 320; *Goundie v. North Water Co.*, 7 Barr, 233; *Runyon v. Coster*, 14 Pet. 122; *Banks v. Poitiaux*, 3 Rand. 136; *McIndoe v. City of St. Louis*, 10 Mo. 577.

The authority first cited is elaborate and exhaustive upon the subject. So an alien, forbidden by the local law to acquire real estate, may take and hold title until office found. *Fairfax's Devisee v. Hunter's Lessee*, 7 Cr. 604.

In the *Silver Lake Bank v. North*, 4 Johns. Ch. 370, the bank was a Pennsylvania corporation, and had taken a mortgage upon real estate in New York. A bill of foreclosure was filed in the latter State. The answer set up as a defense "that by the act of incorporation, the plaintiffs were not authorized to take a mortgage except to secure a debt previously contracted in the course of its dealings; and here the money was lent, after the bond and mortgage were executed." The analogy of this defense to the one we are considering was too obvious to need remark. Both

present exactly the same question. Chancellor KENT said: "Perhaps it would be sufficient for this case, that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of *Pennsylvania* to exact a forfeiture of their charter than for this court in this collateral way to decide a question of misuser by setting aside a just and *bona fide* contract." * * * "If the loan and mortgage were concurrent acts, and intended so to be, it was not a case within the reason and *spirit* of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations. A mortgage taken to secure a loan advanced *bona fide* as a loan, in the course and according to the usage of banking operations, is not surely within the prohibition."

It is not denied that the loan here in question was within the category. This authority, if recognized as sound, is conclusive. See, also, *Baird v. Bank of Washington*, 11 S. & R. 411.

Sedgwick (Stat. and Const. Constr. 73) says: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

What is said in the text is fully sustained by the authorities cited.

We cannot believe it was meant that stockholders, and, perhaps, depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress.

That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application.

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A private person cannot, directly or indirectly, usurp this function of the government.

The decree of the Supreme Court of Missouri is reversed and the cause will be remanded, with directions to dismiss the bill.

MILLER, J., dissenting. I am of opinion that the National Banking Act makes void every mortgage or other conveyance of land as a security for money loaned at the time of the transaction by the bank, to whomsoever the conveyance may be made; that the bank is forbid to accept such security, and it is void in its hands.

The contract to repay the money, and the collateral conveyance for security, are inseparable contracts, and so far independent that one may stand and the other fall.

In the present case the money was loaned on the faith of the deed of trust, and that instrument is void in the hands of the bank, but the note, as evidence of the loan of money, is valid against Mr. Matthews personally. With this latter contract the State court did not interfere. It enjoined proceedings under the deed of trust against the land, and did no more.

Its judgment in that matter ought, in my opinion, to be affirmed.

BARNET V. MUNCIE NATIONAL BANK OF MUNCIE, INDIANA.

(98 U. S. 855.)

Usury — remedy for recovery of illegal interest paid to bank.

Where illegal interest has been paid to a National bank upon the discount of negotiable paper, it cannot, in an action upon such paper, be applied by way of set-off or payment, nor can double the amount of such interest be allowed upon a counter-claim, but the party is restricted to his penal remedy.

IN error to the Circuit Court of the United States for the southern district of Ohio. The opinion states the case.

SWAYNE, J. The bank brought this suit upon a bill of exchange, dated November 18, 1873, for \$4,000, drawn by David

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Barnet upon Barnets & Whiteside, in favor of Robert Marshall, and payable ninety days from date, at the Second National Bank of Cincinnati, Ohio. It was accepted by the drawees, indorsed by the payee, and discounted by the bank. Before the maturity of the bill the acceptors made an assignment to the plaintiffs in error. The suit was commenced in the Court of Common Pleas of Preble county, Ohio, against all the parties to the bill. The assignees intervened and made themselves parties. After the pleadings were made up the case was removed by the bank to the Circuit Court of the United States for that district. There new pleadings were filed on both sides. The assignees set up three defenses: (1) That Barnets & Whiteside were borrowers from the bank as early as January 11, 1866; that the indebtedness was continuous and unbroken from April 8th, 1866; that it was at no time less than \$4,000, and amounted at one time to \$36,000; that at the time of the assignment it was \$28,000, upon bills of exchange which represented it; that the bank had taken not less than \$5,000 in excess of the legal rate of interest; that for evasion the bills were arranged in series, and that each series was terminated from time to time by refusing to renew and the discounting of a new bill, the proceeds of which were applied in payment of the prior terminating one; that the bank had received satisfaction of all the bills but the one in suit, and that there was nothing due from the defendants. (2) That the bill in suit was the last of eight renewals; that illegal interest was taken upon the series to the amount of \$1,116, which it was claimed should be applied as a payment upon the bill in question. (3) That fifty-one bills of exchange of \$4,000 each, having ninety days to run, were discounted by the bank for the assignors, the first bearing date March 27, 1872, and the last July 27, 1873 (the date of each one is given); that illegal interest was taken upon these bills to the amount of \$6,324, and that the assignees are entitled to recover double this sum from the bank, to wit, \$12,648. There is a prayer for judgment accordingly, and for other proper relief.

Marshall, the payee and indorser of the bills, also filed an an-

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swer, but as the record discloses no question raised by him, it need not be more particularly adverted to.

The bank demurred to the several defenses set up by the assignees. To the first and third the demurrer was sustained, and overruled as to the second. Upon the latter the plaintiff took issue, and the case was tried by a jury. The jury rendered a verdict in favor of the bank for \$4,080.31, and judgment was given accordingly. It does not appear that any thing done by the court touching this trial was objected to by the plaintiffs in error. There is no bill of exceptions in the record.

But one point has been insisted upon by the plaintiffs in error in this court, and it is that the Circuit Court erred in sustaining the demurrers to their first and third defenses. That is the only subject before us for examination.

All questions arising under the second defense have been disposed of by the verdict and judgment. How the jury reached their conclusion it is not easy to see, but this is not material, as nothing relating to that part of the case is open to inquiry.

The National Currency Act of Congress of June 3, 1864 (13 Stat. 99, § 30), after prescribing the rate of interest to be taken by the banks created under it, declares :

“ And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged to be a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon, and in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid, from the association taking or receiving the same ; provided that such action is commenced within two years from the time the usurious transaction occurred.”

Two categories are thus defined, and the consequences denounced :

1. Where illegal interest has been *knowingly* stipulated for, but *not paid*, there only the sum lent without interest can be recovered.

2. Where such illegal interest *has been paid*, then twice the amount so paid can be recovered in a *penal action of debt* or suit

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in the nature of such action against the offending bank, brought by the persons paying the same or their legal representatives.

The statutes of Ohio and Indiana upon the subject of usury may be laid out of view. They cannot affect the case.

Where a statute creates a new right or offense, and provides a specific remedy or punishment, they alone apply. Such provisions are exclusive. *Farmers' Nat. Bank v. Dearing*, 91 U. S. 35; Thomp. N. B. Cas. 117.

The procedure in the case after it reached the Circuit Court, as well as before, was governed by the Ohio Code of Practice. *Indianapolis R. R. Co. v. Horst*, 93 U. S. 291.

The ground of demurrer specified as to both the defenses in question is that the assignees had no legal capacity to defend or prosecute by counter-claim in the case. But this does not take from the plaintiff the right to insist that the facts set forth were insufficient to bar the action. Swan's Plead. & Prac. 234; 1 Nash's Plead. & Prac. 161. Under the New York Code from which the Ohio Code is largely copied, it has been held that a demurrer to an answer may be sustained upon a ground not adverted to in the argument by the counsel upon either side. *Xenia Bank v. Lee*, 2 Bos. 701. The demurrer was a waiver of every objection not specified, except the substantial and fatal insufficiency of the pleading to which it related with respect to the facts alleged.

An issue ought not to be tried where it would be a sheer mistrial and a mere waste of time. The court ought *sua sponte* to strike it out or disregard it. If a frivolous issue is left in the record, it does not, therefore, follow that it is to be seriously treated.

In the first defense, the payment of the usurious interest is distinctly averred, and it is sought to apply it by way of offset or payment to the bill of exchange in suit. In our analysis of the statute, we have seen that this could not be done. Nothing more need be said upon the subject.

In the third defense as set forth the like payment is alleged, and there is a claim to recover double the amount paid by way of counter-claim in the pending suit on the bill.

This pleading is also fatally defective for the same reason as the first one. The remedy given by the statute for the wrong is

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a penal suit. To that the party aggrieved or his legal representative must resort. He can have redress in no other mode or form of procedure. The statute which gives the right prescribes the redress, and both provisions are alike obligatory upon the parties.

While the plaintiff in such cases, upon making out the facts, has a clear right to recover, the defendant has a right to insist that the prosecution shall be by a suit brought specially and exclusively for that purpose—where the sole issue is the guilt or innocence of the accused, without the presence of any extraneous facts which might confuse the case, and mislead the jury to the prejudice of either party.

The point specified in the demurrer we have had no occasion to consider. Both defenses as they appear in the record are perhaps liable to other objections, but in examining the case we have not gone beyond the points we have discussed, and we decide nothing else.

The judgment of the Circuit Court is affirmed.

NEW ORLEANS CANAL AND BANKING COMPANY V. CITY OF
NEW ORLEANS.

(99 Otto, 97.)

Assessment—capital stock—legal tenders.

Action to recover taxes. The defendant was a State bank, with a capital of \$1,000,000. It was possessed of less than \$200,000 worth of real estate. The plaintiff city assessed it, in addition to its real estate, for the sum of \$700,000 as its capital or money at interest. The bank refused to pay the tax, on the ground that its capital not invested in real estate consisted of United States legal tender notes, not taxable. *Held*, that the tax was lawfully levied.

IN error to the Supreme Court of the State of Louisiana. The opinion states the case.

BRADLEY, J. This is a writ of error to the Supreme Court of Louisiana, brought to reverse a judgment of that court, affirming

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the judgment of the Superior District Court for the Parish of Orleans. The judgment of the latter court, which was thus affirmed, was a judgment for ten thousand five hundred dollars and interest, being for taxes alleged to be due from the New Orleans Canal and Banking Company, the plaintiffs in error, to the city of New Orleans. In assessing the taxes of the city for the year 1876, the bank had been assessed, in addition to its real estate, for the sum of \$700,000 as its capital, or money at interest; and the rate of assessment being one and a half per cent, the tax amounted to \$10,500. This the bank refused to pay, on the ground that its capital, not invested in real estate, consisted of United States legal-tender notes. Whether this was so, or not, was the question in the cause; for it was not contended, on the part of the city, that it would be lawful to tax United States securities in the hands of the bank. The question therefore was really one of fact; but as the bank alleges that under pretense of deciding the question of fact, the State courts have really sustained a taxation of its legal-tender notes, it becomes our duty to examine the case.

It seems, from a statement which was admitted in evidence, that from February 1st, 1875, to July 1st, 1875, the period during which the assessment-roll was made up, the bank did, in fact, have on hand an amount of currency in the form of legal-tender notes, varying from \$1,500,000 to \$762,000; the latter being the amount on hand on the 30th of June, 1875; but there was no proof in the cause to establish the fact that these notes constituted the capital of the bank, any more than any other equal portion of its assets constituted such capital.

The nominal capital of the bank was one million of dollars, and estimating its real estate at two hundred thousand dollars, the assessment was still one hundred thousand dollars less than the balance of the nominal capital; and it was conceded that the bank had a large amount of assets independent of the currency in its possession. By a statement put into the case by the bank, with consent of counsel, it appeared that on the 28th of June, 1875, its affairs stood as follows:

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ASSETS.			
Real estate		\$182,516	85
Stocks		8,228	85
Taxes paid		14,431	65
Suspended debts.....		54,740	80
Foreign and domestic bills protested		26,949	73
Notes and bills discounted.....		1,833,146	41
Foreign and domestic exchange.....		919,996	51
Interest due on loans on call.....		3,349	47
City 7 per cent gold bonds (\$50,000)		25,750	00
Cash items :			
Gold	\$32,419	80	
Legal tenders.....	974,777	17	
Checks sent to clearing-house	173,409	73	1,179,609 70
			<u>\$4,248,716 47</u>
LIABILITIES.			
Capital stock.....	\$1,000,000	00	
Profit and loss	99,694	00	
Dividends unpaid ...	46,556	00	
Individual depositors.....	3,044,957	19	
Foreign banks and bankers	48,061	78	
Circulation	9,447	59	
			<u>4,248,716 47</u>

An inspection of this statement shows that the bank had over four million dollars of assets; and that the assets were sufficient to pay all its debts, and leave enough balance to return to the stockholders all their capital. Now, does it lie with the bank to put its finger on a particular item of the assets—its money on hand, for example (which appears to have consisted of legal tenders)—and say that this item, and no other item, constituted its capital at that time? Does this depend on the mere option of the bank? Why was not its cash on hand just as applicable to its deposits and other obligations as to its capital? Not a particle of proof was offered, and it is difficult to see how any proof could have been offered, to show that the cash exclusively constituted the capital.

The bank had probably been in operation for years. It is to be presumed that its original capital, not invested in real estate, had been loaned out to its customers; and was rather repre-

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sented by its discounted bills than by the cash in its drawer. Can it be pretended that the cash on hand was the simple and only representative of that capital? Suppose that this cash had to come to the bank from its depositors — and it is not shown to the contrary — would it be admissible then to say that it constituted the capital? In this suit the burden of proof is on the bank, to show that it has been unlawfully taxed. The decision of the assessor must stand unless it can be affirmatively controverted.

We cannot perceive that the judgment of the Supreme Court of Louisiana invades any right of the plaintiff in error secured to it by the Constitution or laws of the United States, and therefore it must be affirmed.

GERMANIA NATIONAL BANK OF NEW ORLEANS V. CASE, Receiver.

(36 U S 623.)

Stockholder — liability of pledgee of stock — transfer to escape liability.

One to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. Where the owner, holder, or pledgee of stock transfers it out and out for the purpose of escaping liability as a shareholder to one who is unable to meet such liability, or when the transfer is colorable and not absolute, the transfer is ineffective as to creditors and the transferor will be still liable. Therefore, when the G. Bank loaned money and took as collateral therefor shares of stock in the C. Bank, which were duly transferred in the books of the C. Bank, and afterward the G. Bank transferred these shares to one of its clerks, with an understanding that he should re-transfer on request, and the C. Bank was then in failing condition, *held*, that the G. bank was liable to contribute as a stockholder to the debts of the C. Bank. (*See note, p. 81.*)

A PPEAL from the Circuit Court of the United States for the District of Louisiana. The opinion states the case.

STRONG, J. This is a bill, the object of which is to compel contribution by the stockholders of the Crescent City National Bank, of New Orleans. It asks for a decree that each of the defendants pay to the receiver of the bank seventy per cent of

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the par value of the stock owned by them severally at the time when their respective liabilities were fixed by the bank's insolvency, without regard to any pretended transfers of such stock which they may have attempted to make after the insolvency occurred.

The bank was organized under the National Banking Law in 1871. On the 13th of February, 1873, its London correspondents failed, and the bank lost heavily by the failure — nearly the entire amount of its capital. This loss was almost immediately known in the community where the institution was located, and necessarily affected its credit. On the 14th of March, 1873, payment of checks drawn upon it by its depositors was suspended, and on the 17th of the same month its circulating notes went to protest.

In reference to the alleged ownership by the Germania Bank (one of the appellants) of shares in the Crescent City Bank, the facts appear to be as follows: On the 14th day of December, 1872, it loaned to Phelps, McCullough & Co. \$14,000 on a note of the firm dated December 7, 1872, payable in ninety days, and to secure the payment of the loan, the borrowers pledged to the bank one hundred shares of the stock of the Crescent City Bank, with power, on non-payment of the note, to dispose of the stock for cash, at public or private sale, without recourse to legal proceedings, and to this end to make transfers on the books of the corporation whose stock it was. At the same time a power of attorney was given to Mr. Roehl, empowering him to transfer the stock to the Germania Bank, of which he was cashier. The note fell due on the 10th of March, 1873, and was not paid, and on that day a transfer of the one hundred shares to the Germania Bank was made on the transfer books of the Crescent City Bank. The Germania then caused seventy-six of the shares to be transferred to William A. Waldo, one of its clerks, and on the next day transferred to him the remainder. It has ever since stood in his name. Waldo acquired by the transfer no beneficial interest in the stock, and there was an understanding between him and the officers of the bank that he should re-transfer it at their request. The cashier has testified, in answer to the ques-

tion, "Was not the transfer made (to Waldo) with the view to avoid the liability under the National Bank Act in case of suspension of the Crescent City Bank?" that it was not exactly in that way. "We simply transferred," says he, "because we are not in the habit of holding any bank stock. We did not want to have any bank stock in our name. That was the object." When further asked whether he was well aware of the fact that the stockholders of National banks were liable to contribute to the payment of their debts in case of insolvency, he replied in the affirmative. When asked whether he did not have that in contemplation at the time of the transfer, he answered "That may be one of the reasons why we did not want to own any stock." And when further asked, "Was not that one of the principal motives of this transfer to Waldo?" his reply was, "Yes."

From this testimony, as well as from other in the record, it is evident that Waldo held the stock as a cover for the Germania Bank; that notwithstanding the transfer to him, it remained subject to the bank's control, and that the transfer to him was made to evade the liability of the true owners. It was not a sale. The bank continued after it was made a pledgee with the legal title in itself or in its representative, and Phelps, McCullough & Co. were no longer the owners.

Such being the facts of the case, there can be no serious controversy respecting the principles of law applicable to them. It is thoroughly established that one to whom stock has been transferred in pledge or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. We so held in *Pullman v. Upton*, 96 U. S. 328, and like decisions abound in the English courts, and in numerous American cases, to some of which we refer: *Adderly v. Storm*, 6 Hill, 624; *Roosevelt v. Brown*, 11 N. Y. 148; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Magruder v. Colston*, 44 Md. 329; s. c., 22 Am. Rep. 47; *Crease v. Babcock*, 10 Metc. 545; *Wheelock v. Kort*, 77 Ill. 296; *Empire City Bank*, 18 N. Y. 199; *Hale v. Walker*, 31 Iowa, 344; s. c., 7 Am. Rep. 137. For this several reasons are given. One is that he is estopped from denying his liability

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by voluntarily holding himself out to the public as the owner of the stock, and his denial of ownership is inconsistent with the representations he has made. Another is, that by taking the legal title he has released the former owner; and a third is, that after having taken the apparent ownership and thus become entitled to receive dividends, vote at elections, and enjoy all the privileges of ownership, it would be inequitable to allow him to refuse the responsibilities of a stockholder. This subject is well treated in Mr. Thompson's recently published work on "The Liability of Stockholders," where may be found not only a full collection of authorities, but a careful analysis of what the authorities contain. *Vide* chap. 13.

When, therefore, the stock was transferred to the Germania Bank, though it continued to be held merely as a collateral security, the bank became subject to the liabilities of a stockholder, and the liability accrued the instant the transfer was made. At that instant the liability of Phelps, McCullough & Co. ceased. We have then only to inquire whether the bank succeeded in throwing off that liability by its transfer to its clerk, Waldo. It certainly did not thereby divest itself of its substantial ownership. It is not every transfer that releases a stockholder from his responsibility as such. While it is true that shareholders of the stock of a corporation generally have a right to transfer their shares and thus disconnect themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers, if they are made (as it is called) "out and out," that is, completely, so as to divest the transferor of all interest in the stock. But even in them it is held that if the transfer is merely colorable, or as sometimes coarsely denominated, a sham — if in fact the transferee is a mere tool or nominee of the transferor, so that as between themselves there has been no real transfer, "but in the event of the company becoming prosperous the transferor would become interested in the profits, the transfer will be held for nought

and the transferor will be put upon the list of contributories."

Williams' case, L. R. Eq. 224, note, where the transfer was, as in the present case, made to a clerk of the transferor without consideration. *Payne's* case, id. 223; *Kintrea's* case, L. R., 5 Ch. App. 95; see, also, Lindley on Partnership, 2d ed., p. 1352; *Chinnoek's* case, 1 Johns. Eng. Ch. 714; *Hyam's* case, De Gex, F. & J. 75; *Budd's* case, 3 id. 297. The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: "A transfer of shares in a failing corporation, made by the transferor with the purpose of escaping his liability as a shareholder, to a person, who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although as between the transferor and the transferee it was out and out." *Nathan v. Whitlock*, 9 Paige, 152; *McClaren v. Franciscus*, 43 Mo. 467; *Marcy v. Clark*, 17 Mass. 334; *Johnson v. Laflin*, by DILLON, J., Thomp. N. B. Cas. 331.

The case in hand does not need the application of so rigorous a doctrine. While the evidence establishes that the Crescent City was in a failing condition when the transfer to Waldo was made, and leaves no reasonable doubt that the Germania Bank knew it and made the transfer to escape responsibility, it establishes much more. The transfer was not an out and out transfer. The stock remained the property of the transferor. Waldo was bound to re-transfer it when requested, and all the privileges and possible benefits of ownership continued to belong to the bank. No case holds that such a transfer relieves the transferor from his liability as a stockholder. We are therefore compelled to rule that the decree of the Circuit Court against the Germania Bank was correct. Its case, no doubt, is a hard one, but it is not in our power to give relief without a sacrifice of the well-established rules of law and equity both in this country and in England.

There is nothing in the argument on behalf of the appellant that the bank was not authorized to make a loan with the stock of another bank pledged as collateral security. That is an ordinary mode of loaning, and there is nothing in the letter or spirit of the National Banking Act that prohibits it. But if there were, the

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lender could not set up its own violation of law to escape the responsibility resulting from its illegal action.

In support of the other appeals which were taken from the decree of the court below no argument has been submitted, and they require only brief remarks.

Alcus, Scherck, and Autey in their first answer to the bill, after setting forth several matters perfectly immaterial, admit that they were at one time the owners of seventy shares of the stock of the Crescent City National Bank, but aver that on the [blank] day of [blank], 1873, they sold them all to one Julius Fox, a white person, about twenty-one years old, and a clerk by occupation; that the price paid to them by Fox for the stock was five dollars, and that they never offered to Fox any money or other valuable consideration or promise to induce him to accept the stock. The utter worthlessness of this as a defense sufficiently appears in what we have said respecting the appeal of the Germania Bank. Subsequently what is called a supplemental and amended answer was filed, quite inconsistent with the one first made. It admits the ownership of the stock by the respondents at the time of the bank's insolvency and suspension, and merely denies any unlawful confederacy. That no defense was shown by this supplemental answer we need spend no time to prove.

The only material averment in the answer of the Crescent Mutual Insurance Company was in substance that they had owned shares of the stock of the Crescent City Bank before it became a National bank, and that though the State bank had become a National bank with their consent, and they had received dividends, they had not received new certificates. The stock ledgers of the bank, however, show that one hundred and thirty shares stood in their name when the bank failed, and therefore, taking their averment to be true, it is impossible to find any reason why they are not subject to the liabilities of stockholders.

The appeal of Benjamin J. West is equally without merit. It was admitted by his answer and proved by his own testimony, that on the 13th of March, 1873, the day before the bank ceased paying its depositors, he was the owner of fifty-eight shares of its stock. On that day he transferred it to one Vincent, whom he

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describes as a white man, about thirty-five years old, a salesman by trade, for the price of about ten dollars a share. Nothing more than the testimony of Mr. West himself is needed to show that this is what is called in the English books a sham sale, made to conceal his liability. Vincent was West's clerk at the time, and so far as it appears, without any pecuniary responsibility. No certificate of the stock was issued to him. He paid nothing at the time of the alleged transfer, and never has paid any thing since. He gave no note or other written acknowledgment of indebtedness, and West continued to pay his salary as a clerk six or eight months after the transfer, without deducting any thing for the price of the stock. Indeed, the price of the stock was never charged against Vincent in West's books. And to this the fact plainly visible in his testimony, that the alleged transfer was made when Mr. West had become alarmed about the condition of the bank, and nothing more is needed to show that it was inoperative, as against the creditors of the bank, according to the doctrine of the cases hereinbefore cited.

There are some other averments in the answer of the appellants of which it is hardly necessary to say any thing. Former decisions of this court have ruled that the determination of the Comptroller of the Currency and his order to the receiver are conclusive of the extent to which the liability of stockholders of insolvent banks may be enforced in suits against such stockholders.

The several appeals in this case are not sustained, and the decrees of the Circuit Court are affirmed.

NOTE BY THE REPORTER.—The Master of the Rolls in *Reynolds v. Cleveland Extension Mineral Railway Company*, decided as to the absolute right of a shareholder in a railway company incorporated by act of parliament, to transfer his shares to a pauper. There is no very modern reported case on this subject, and no English case as to the right of the transferee to a *mandamus* in a case of the above description. *Reynolds'* case was a motion for a *mandamus* to the company to register a transfer of 1,000 shares to him, it being admitted that all calls

had been paid up, and that he was a man of no means, and to whom a consideration had been given to undertake the uncalled liability on the shares. The company objected to the transfer on the ground that Reynolds was a person of no substance, and one who would be quite unable to pay any future calls. The requisites of the act had all been duly complied with, and the Master of the Rolls was clear that the *mandamus* must issue. He said that the right of every shareholder in a railway company to transfer his shares was absolute, subject only to

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this, that he must have paid any calls previously made. This right of transfer was one of the most valuable adjuncts of railway property, and no railway company could object to a transfer to a man of straw. The company were unable to suggest that there was not an out-and-out transfer, or that the deed did not show the consideration that had been paid to the plaintiff to undertake the liability.

For our own part we see no distinction between this case and that of an original purchase of shares by an insolvent. A similar question arose and was similarly decided some years ago at the Rensselaer Circuit, in New York, where a stockholder in a manufacturing corporation, anticipating a suit in the future to render him personally liable gave away his stock to his gardener, an irresponsible person. There being nothing to show that the transfer was not absolute, the late Justice Gould held it valid. The remarks on this point in the principal case seem *obiter*.

Mr. Thompson, cited by the court as their authority, however admits, § 211, that the English doctrine is as above stated. In addition to the four cases above cited, he cites several other American cases, which we will examine, namely: *Patne v. Stewart*, 33 Conn. 516; *Dauchy v. Brown*, 24 Vt. 197, 210; *Roman v. Fry*, 5 J. J. Marsh. 634; *Mandion v. Fireman's Ins. Co.*, 11 Rob. (La.) 177; *Provident Savings Inst. v. Jackson Place Skating and Bathing Rink*, 52 Mo. 557; *Miller v. Great Republic Ins. Co.*, 50 id. 57.

Nathan v. Whitlock, 9 Pa. 152, decides that "a solvent stockholder, who has given a stock note to a corporation for the purchase-money of his stock, cannot, upon the insolvency of the company, or in contemplation of that event, even with the consent of the directors, transfer his stock to an irresponsible person, and be discharged from his liability upon substituting the note of such person for his own;

such an arrangement having the effect of a withdrawal of so much of the capital of the corporation, and being a violation of the statute to prevent fraudulent bankruptcies of incorporated companies." This is not an authority for the broad proposition of the text, in a case where the stockholder has paid for his stock. Even in England the decision would have been the same, probably, for the stockholder was still liable to calls by the company.

In *McClaren v. Franciscus*, 43 Mo. 467, the court, as was said in *Miller v. Great Republic Ins. Co.*, 50 id. 57, "held the stockholder liable because the transfer he had made was not complete on the books of the company. He had merely transferred his certificate of stock, and did not have the transfer entered on the books; so he was still held a stockholder as to the execution-creditors of the company." The latter case, also cited by Mr. Thompson, simply holds that "where before execution against a corporation, the stockholder, honestly and without any intention to defeat the creditors of the company, sells and transfers his stock, the mere fact that the purchaser was insolvent at the time is not sufficient to hold such stockholder still liable for the debts. The question in such cases is, whether the transfer was fraudulent and void as to creditors of the company. If the stockholders knew of the insolvency at the time of the transfer, it would be very strong evidence of fraud." The latter remark is manifestly *obiter*.

Provident Savings Institution v. Jackson Place Skating and Bathing Rink, 52 Mo. 557, decides that a stockholder cannot escape his liability under the former double liability clause of the Constitution of Missouri, by transferring his stock in the corporation to an insolvent, or with a view of exonerating himself from his personal responsibility. But this was founded on the two Missouri cases above cited, and on the assumption that *McClaren v. Fran-*

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claus decided the same doctrine. which we have seen was not the fact. The court entered into no discussion of the principle nor examination of authorities.

In *Johnson v. Laffin*, Thomp. N. B. Cas. 331, the precise question did not arise. Laffin had paid for his stock in a National bank, and employed a broker to sell it. The broker, without Laffin's knowledge, sold it to the president of the bank, individually. The president transferred it to the bank, causing the bank to pay for it. The bank was then insolvent, but this was not known to Laffin or his broker. *Held*, that although the statute prohibited the bank from buying its own shares, yet, as Laffin sold in good faith, he was not liable in a suit by the receiver of the bank for the money received for his shares. The court did not undertake to decide what would have happened if Laffin's transfer had been in bad faith or with knowledge that the sale was really to the bank, although it is easy to see that the prohibition of the statute would have rendered such a transfer void. The court do indeed say: "And on general principles there may also be an implied prohibition against the transfer of shares to a pauper or man of straw, or insolvent person, for the fraudulent purpose of escaping liability;" but adding, "but this is a matter that need not now be considered."

As we interpret *Paine v. Stewart*, 33 Conn. 516, the question under examination was not passed upon. The syllabus correctly states the decision as follows "Where a general banking law of a State imposed upon the stockholders of banks, which should be organized under it, individual liability to double the amount of their stock, while they continued stockholders, and one year thereafter, and P., a creditor of the bank, made demand of S., a stockholder, for the payment of his debt, the bank being insolvent, and S. requested delay, promising not to

transfer his stock, but did secretly and fraudulently transfer it; *held*, in a suit brought more than a year after such transfer, that it was inoperative against P." The court say only this upon this point: "The delay in commencing the suit was directly induced by the promise by the defendant that he would not transfer his stock and deprive the plaintiff of the rights which he then had to institute the suit. Under such circumstances the transfer was wrongful and fraudulent, and as against the plaintiff inoperative." (That is to say, the defendant was estopped by his conduct.) Citing *Middleton Bank v. Magill*, 5 Conn. 70, which does not involve the doctrines of estoppel, and does not involve the doctrine under examination. The question of fraudulent transfer did not arise, but the question was whether an action could be maintained against transferees of stock acquiring it subsequently to the contracting of the debt, and it was held that it could not. The court then remarks: "One objection still remains to be encountered, viz.: that if a member, by transferring his interest, exonerates himself from all personal liability, then the members may, at any time (in case the corporation becomes insolvent) defeat the claims of creditors, by transferring their interests to bankrupts. Were this true, the argument derived from it would be indeed formidable. But no principle is better settled than that a conveyance made with intent to defeat a creditor is void. If then the members dispose of their interests with such intentions, the creditor may treat them as members; and of course they will remain liable to the same extent that they would have been had they made no such conveyance. Vide *Marcy v. Clark*, 17 Mass. 330." This is *obiter*; and besides, it probably refers to a transfer after the liability is fixed."

Marcy v. Clark, 17 Mass. 330, contains language strongly supporting the view

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taken by Mr. Thompson, but we think it will be discovered to have been unnecessary to the decision. The case showed a transfer without adequate consideration and for the purpose of escaping liability. The court remarked: "Since this statute was enacted, all who deal with such companies look, for their security, to the individual members, rather than to the joint-stock; and to suffer those members to avoid their responsibility, by parting with their stock, would be to deprive the creditor of a vested right, and of the means of satisfying his debt. For such a measure would not be resorted to, but in case of the actual or expected insolvency of the company. We cannot doubt, then, that a transfer of an interest in the stock of such corporations, not *bona fide*, but for the purpose of defeating the creditors of the company, is fraudulent and void. Otherwise the wholesome provision of the statute for the security of creditors would be unavailing, at the very time, and in the very circumstances in which it was intended to operate. Under the statute we have been considering, those who are liable must be members when the execution is levied. But the Legislature have thought that a further security was necessary; for there may be *bona fide* sales, by which the shares may be transferred from those who are able, to those who are unable to pay debts existing at the time of the transfer, and it was reasonably thought that it was to the credit of those who were members when the debt was incurred that the creditor trusted. It was therefore provided by the statute of 1817, ch. 183, that the bodies and estates of those who were members at the time any debt accrued, as well as of those who were members when the execution issued, should be liable. So that even a *bona fide* transfer of shares will not relieve the member from any debt which accrued while he was a member of the corporation." The last sentence

shows that what was said about fraudulent transfers was *obiter*, for the transferor was still liable at all hazards.

Roman v. Fry, J. J. Marsh. 634, is so inadequately reported that we cannot tell what really was decided. The court said "this was an attempt" to escape individual responsibility as a stockholder, and referred, for the settlement of the principles governing the case, to *Dallam v. Holmes*, which seems not to be reported. They continue: "If Dallam were permitted to escape by taking stock in the names of infant children, the whole object of the charter in securing the community against the insolvency of the corporation might be defeated." This intimates that it was not a case of transfer, but of original taking out of stock in the names of infants not really the owners.

What we have said of *Middleton Bank v. Magill* is applicable to *Dauchy v. Brown*, 24 Vt. 197, 210. That case did not involve that question; but the court, *obiter*, after holding that a prior judgment against the corporation was necessary, in answering the argument that the purpose of the statute might be defeated by a fraudulent transfer by the stockholder pending that action, took it for granted that such a transfer could not be sustained. They said "it has been too frequently decided to be considered as an open question," but cite only *Marcy v. Clark*, *Middleton Bank v. Magill*, and *Roman v. Fry*; in none of which, as we have seen, is any such doctrine held.

It is to be remarked that none of the English cases are mentioned in any of the American.

On the other hand, in *Magruder v. Colston*, 44 Md. 349; s. c., 22 Am. Rep. 47; Thomp. N. B. Cas. 554, it was held that where National bank stock was pledged to secure a debt, with power to the pledgee to sell it on default of payment, a sale by him pursuant to the power was not voidable as a fraud on

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the creditors of the bank, although he sold because he believed the bank insolvent, for a nominal consideration, and in order to escape personal liability under the statute as a stockholder. This holding was adopted on the authority of *Holyoke Bank v. Burnham*, 11 Cush. 187, and the basis of it is that the second transfer was made in execution of the agreement at the time of the original transfer, and therefore was not obnoxious to the charge of a fraud on creditors, although its leading object and purpose might have been to avoid personal liability as a stockholder. The court expressly declines,

in the latter case, to consider the question of a transfer to avoid liability, when not based upon an original contract for a re-transfer. We believe it would be difficult to distinguish the two last cases from the principal case, when the fact of the nominal consideration of the second or re-transfer is considered.

Whatever we may think of the question upon principle, it is clear that the doctrine, as stated by Mr. Thompson, can hardly be regarded as authoritatively settled in this country. See *Bowden v. Santos*, Thomp. N. B. Cas. 271.

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(100 U. S. 239.)

Statutory construction — Usury.

The statutes of Alabama examined, and held to place bills of exchange and promissory notes, payable in money, at "*a certain place of payment designated therein*," upon the same basis as to immunity from set-off, discount, or equities, as bills and notes payable at a bank or private banking-house. Such declared to be the intention and effect of the act of April 8, 1873, amending section 1833 of Revised Code of Alabama.

The intention of the legislature, clearly expressed in a constitutional enactment, should not be defeated by too rigid adherence to the letter of the statute, or by technical rules of construction. Any construction should be disregarded which leads to absurd consequences.

The Federal courts are not bound by decisions of State courts upon questions of general commercial law.

A creditor who takes a negotiable note, before maturity, so indorsed that he becomes a party to the instrument, as collateral security for a pre-existing debt, in consideration of an extension of time to the debtor, actually granted, is, according to the law-merchant, a holder for value, and his rights as such are not affected by equities between antecedent parties of which he had no notice.*

A National bank, at the request of its debtor, gave further time in consideration of the transfer, before maturity, of a negotiable note, as collateral security, and in consideration also of the payment, in advance, of usurious interest, for the period of extension. The note was so indorsed as to make

* See *Brooklyn City and Newtown R. R. Co. v. Nat. Bank of Republic*, post.

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the bank a party to the instrument, responsible for its due presentation, and for due notice of non-payment. The consideration was, in part, legal and, in part, vicious. The former was itself sufficient to sustain the contract of extension and transfer, and to constitute the bank a holder for value. While the bank was subject to the penalties, denounced by law for taking usurious interest, the statute under which it was organized had not declared the contract of indorsement void. No such penalty being prescribed, the courts could not superadd it.

IN error to the Circuit Court of the United States for the Middle District of Alabama. The opinion states the case.

HARLAN, J. This is a writ of error to a judgment in behalf of the First National Bank of Montgomery, against Oates, the plaintiff in error, upon a promissory note for \$5,200, executed by him at Eufala, Alabama, on the 25th day of July, 1873, and made payable on the 1st of December thereafter, to the order of B. H. Micow, president, at the office of the Tallassee Manufacturing Company, No. 1, in the city of Montgomery. The consideration of the note was fifty shares of the capital stock of that company purchased by Oates, and for which, at the time, he received a certificate in the customary form. As part of the contract of purchase he took from the company a separate written obligation, reserving to him the option, on the 1st of December, 1873, at the maturity of the note, of surrendering the certificate of stock and receiving his note duly cancelled. It appears that Oates was induced to buy the stock upon certain representations of the special agent of the company as to its financial condition. These representations were subsequently ascertained by him to have been false and fraudulent.

On or about November 4, 1873, Micow applied to the bank for an extension of time upon certain indebtedness then held by it against the company, amounting to about \$40,000, and all of which matured thereafter and in that month. That indebtedness had been previously extended, on several occasions, at usurious rates of interest, paid invariably in advance. The bank signified its willingness to give an extension for 30, 60, 90, and 120 days, upon collateral security being furnished, and upon the payment in advance for such extension, of interest at the rate of one and one-

quarter per cent per month, upon the different classes of the company's paper by it held. These conditions were complied with, and the extension was accordingly made for the periods stated. The required interest was not carried into the extension bills but was paid in advance. Among the collaterals placed with the bank, under this arrangement, was the note for \$5,200 already described, indorsed in blank, "B. H. Micow, Prest."

The evidence was somewhat conflicting as to whether the officers of the bank, at the time of receiving the note in question, had actual notice from Oates as to its consideration. It was however conceded, that its president had reason to believe the note was given for stock of the company. Oates, although residing at Eufala, was a stockholder and director of the bank. No inquiry was made of him by the officers of the bank, before receiving the note as collateral security, as to any defense which he might have against its payment. But it was proven by them that when the extension was given to the company, they had no notice of any defect in, or defense to, the note, or of any equities, except such notice as might be implied from the foregoing facts and the relations of the parties. It is not claimed that the bank had, at that time, any notice of the separate written obligation of the manufacturing company to which we have already referred.

On the 24th of November, 1873, the bank gave written notice to Oates that it held his note as collateral security for the indebtedness of the company. A few days thereafter he transmitted to the bank the company's agreement or obligation, under which he had purchased the stock and given his note, informing its officers that he had, by the same mail, returned his stock-certificate to the company, and demanded the surrender and cancellation of his note. The bank, replying to this notification, stated that it had purchased the note as negotiable paper, in good faith, for a valuable consideration, and without notice of any private understanding between Oates and the company, its officers or agent.

These are the essential facts developed in the record. We are to inquire whether the court below committed any error of law to the prejudice of the plaintiff in error.

1. The first contention of the plaintiff in error is, that by the

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terms of the contract under which he purchased the stock and gave his note, and in view of the false and fraudulent representations of the company's agent as to its financial condition, he was entitled, as of absolute right, to surrender the certificate of stock and have his note returned or cancelled; and further, that his defense, upon that ground, was secured to him by the statutes of the State of Alabama, in force when the contract was made.

It is clear that, as between the Tallassee Manufacturing Company and Oates, the defense of the latter is perfect. And it would undoubtedly be sustained, even against the defendant in error, were it true, as claimed, that by the statutes of Alabama, the transfer of the note was without prejudice to any defense which the maker might assert against the payee. This renders it necessary that we should ascertain to what extent, if at all, the rights of parties are affected or controlled by the statutes of Alabama.

By section 1833 of the Revised Code of that State it is declared that "bills of exchange and promissory notes payable in money, at a bank or private banking-house, are governed by the commercial law, except so far as the same is changed by this Code." Section 1839 declares that "all contracts or writings, except bills of exchange, promissory notes payable in money at a bank or private banking-house, and paper issued to circulate as money, are subject to all payments, set-offs, and discounts had or possessed against the same previous to notice of the assignment or transfer."

Thus stood the law of Alabama until April 8, 1873, when, by statute of that date, entitled "An act to amend section 1833 of the Revised Code of Alabama," it was enacted that section 1833 (copied in full in the act) "be so amended as to read as follows: 'Bills and notes payable at a banker's, or *a designated place of payment*, are *negotiable instruments*; bills of exchange and promissory notes payable in money, at a bank or *a certain place of payment therein designated*, are governed by the commercial law.'" Acts 1872-3, p. 111. By the same statute, section 1833, as it then stood in the Revised Code, was expressly repealed. It should be observed that the words "except so far as the same is

changed by this Code," in section 1833 as it originally stood, are omitted from that section as remodelled by the act of 1873.

The argument of the plaintiff in error is, that although by the explicit declaration in the act of 1873, bills and notes payable in money at a "certain place of payment therein designated," are negotiable instruments, to be governed by the commercial law, such bills and notes are nevertheless, under section 1839, "subject to all payments, set-offs and discounts had or possessed against the same previous to notice of the assignment or transfer." We concur with the court below in holding that construction to be wholly inadmissible. It seems that upon this precise point there has been no direct adjudication by the Supreme Court of Alabama, to which primarily belongs the duty of giving authoritative construction of the statutes of that State. The only case in that court to which we are referred, that has any bearing upon this question, is *Cook v. Mutual Ins. Co.*, 53 Ala. 37. Jones, it seems, gave to Cook, in 1871, a promissory note, payable to the order of the latter at the office of W. H. Roberts, Mobile, and indorsed by the payee to the insurance company. In an action instituted by the insurance company against Cook, the question arose as to whether the note was commercial paper, protected, in the hands of a *bona fide* holder for value, against defenses resting upon payment, set-off, or discount. The inferior State court, ruled that it was paper of that kind, but the Supreme Court of Alabama held that the note, when made, was not commercial paper, and that the rights and liabilities of the parties were to be determined by the statute in force at the date of its execution. That court, speaking by its chief justice, said: "Since the making of the promissory note, on the indorsement of which this suit is founded, the statute of April 8th, 1873, has converted promissory notes, payable in money at a designated place, into negotiable instruments governed by the commercial law. It operates on the nature and obligation of the contract of the parties to such notes, and cannot be construed as affecting notes made and indorsed prior to its passage. The law of force, when the note is made and indorsed, regulates and defines the liability of the parties." No other reasons are assigned in support of the conclusion that the

act of 1873 did not control the case. It is quite manifest, from the language employed by the Supreme Court of Alabama, that had the note there in suit been executed subsequent to the act of 1873, it would have sustained the ruling of the inferior State court, and excluded all defenses inconsistent with the established doctrines of the commercial law. Such, in our opinion, must have been its determination upon any proper construction of the act of 1873. It is true that that statute does not in express words *amend* section 1839, whereby *only* 'bills of exchange and promissory notes, payable in money at a bank or private banking-house, and paper issued to circulate as money,' are, in terms, protected against payments, set-offs, and discounts, which the maker might assert in the case of all other contracts and writings. But it is perfectly evident that the object of the act of 1873 was to place bills of exchange and promissory notes, payable at a certain designated place of payment, upon exactly the same basis, as to immunity from set-off, discount, or equities, as the statute prescribed in reference to bills and notes payable at a bank or private banking-house. In declaring that bills and notes of the former class were negotiable instruments, to be governed by the commercial law, the legislature necessarily intended to throw around such paper the same protection that had previously been given by statute to bills and notes payable at banks or private banking-houses. If such was not its object, then, confessedly, the act of 1873 was both meaningless and illusory. The duty of the court, being satisfied of the intention of the legislature, clearly expressed in a constitutional enactment, is to give effect to that intention, and not to defeat it by adhering too rigidly to the mere letter of the statute or to technical rules of construction. *Wilkinson v. Leland*, 2 Pet. 662; *Sedgw. on Const. and Stat. Const.* 196. And we should discard any construction that would lead to absurd consequences. 7 Wall. 486. We ought, rather, adopting the language of Lord HALK, to be "curious and subtle to invent reasons and means" to carry out the clear intent of the law-making power when thus expressed. The defense of the plaintiff in error would be good under section 1839, if no regard was had to the act of 1873, but since that statute expressly included notes payable at a

certain designated place in the class of negotiable instruments to be governed by the commercial law — which could not be if section 1839 be enforced according to its literal import — the judiciary must respect the latest expression of the legislative will, and not permit it to be eluded by mere construction. “A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute unless it be within the meaning of the makers.” 15 Johns. 338, 380.

For these reasons we are of opinion that the statutes of Alabama do not permit, as against a *bona fide* holder, for value, of a promissory note, payable in money at ‘a certain place of payment therein designated,’ defenses which are disallowed in cases where the note is payable at a bank or private banking-house.

2. Giving to the Alabama statute the construction indicated, our next inquiry is whether the bank, under the circumstances disclosed in this case, became, according to the recognized principles of commercial law, a *bona fide* holder for value of the note in suit. That it acquired the note in good faith, without fraud, we are not permitted by the evidence to doubt. Its officers were not bound to inquire of the plaintiff in error, before they took the note, whether he had any defense or set-off. They rightfully supposed, as the face of the note imported, that he had undertaken absolutely to pay the amount specified at the time and place designated. That the president of the bank had reason to believe it was given for stock of the Tallassee Manufacturing Company is a fact of no significance whatever in determining the question of good faith. Having no knowledge or notice of the private agreement between Oates and the company, as set forth in the separate obligation of the latter, which was withheld from the public, the bank officers justly assume that there was no circumstance attending the sale of the stock which could lessen the obligation of Oates to pay the note according to its tenor and effect.

But it is contended that by the rules of commercial law, as recognized by the Supreme Court of Alabama, one who receives a promissory note as collateral security for a pre-existing debt does not become a purchaser for value, in the course of business, so as

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to cut off equities which the maker may have against the payee. Such was declared to be the settled doctrine of that court in *Fenouille v. Hamilton*, 35 Ala. 322. But the opinion in that case contains some passages which apply, with peculiar force, to a suit like this. The court said : " In this case there was no other consideration for the transfer of the note to the defendant than the security of the pre-existing indebtedness of the defendant's indorsee. The fact that the defendant may have been led to grant indulgence, or forbear to enforce his remedies for the collection of the debts, does not prove that such indulgence or forbearance was an element of the contract, or the consideration upon which it was made. If there was any forbearance by the defendant it was a voluntary act, to which he may have been persuaded by the collateral security, and may have resulted from a consciousness of security ; but such forbearance was not the result of contract, and is not shown to have been the consideration of it." Had there been, in that case, a present consideration for the transfer of the note beyond giving security for a pre-existing debt, or had the forbearance of the creditor to enforce his remedies been an element in a binding contract, under which the collateral security was furnished, we are persuaded that the Alabama court would have ruled that the creditor in receiving the collateral became a holder for value, in the course of business. But if we are mistaken in our interpretation of the decision of the Supreme Court of Alabama, the result will not follow for which plaintiff in error so earnestly contends. While the Federal courts must regard the laws of the several States, and their construction by the State courts (except when the Constitution, treaties, or statutes of the United States otherwise provide), as rules of decision in trials at common law in the courts of the United States, in cases where applicable, they are not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently announced that we need only refer to a few of the leading cases bearing upon the subject. *Swift v. Tyson*, 16 Pet. 1 ; *Watson v. Tarpley*, 18 How. 520 ; *Carpenter v. Prov. Ins. Co.*, 16 Pet. 511. We have already seen that the statutes of

Alabama placed under the protection of the commercial law, promissory notes payable in money at a certain designated place, but how far the rights of parties here are affected by the rules and doctrines of that law is for the Federal courts to determine upon their own judgment as to what these rules and doctrines are.

Upon principle and authority we do not doubt that the defendant in error was, in the sense of the commercial law, a *bona fide* holder for value of the note in suit. In *Swift v. Tyson*, 16 Pet. 22, cited by counsel, this court, speaking by Mr. Justice STORY, said that it entertained no doubt "that a *bona fide* holder, for a pre-existing debt, of a negotiable instrument is not affected by any equities between antecedent parties, when he has received the same before it became due, without notice of any such equities." In some of the State courts the authority of that case has been disputed, so far as the language of the court referred to collateral security received for a pre-existing debt, upon the ground that the note, there in suit, was transferred in payment of, and not as security for, a pre-existing debt, and that consequently the opinion expressed in the language just quoted was unnecessary to the decision of the point in issue. In the more recent case of *Goodman v. Simonds*, 20 How. 253, it was contended that a party who took negotiable paper *merely* as collateral security for a pre-existing debt, did not acquire it in the usual course of business, but took it subject to prior equities. The court being of opinion that no such question was presented by the record, waived its consideration. But after an extended review of the authorities, American and English, the court, speaking through Mr. Justice CLIFFORD, said: "It seems now to be agreed that, if there was a present consideration at the time of the transfer, independent of the previous indebtedness, a party acquiring a negotiable instrument before its maturity, as a collateral security to a pre-existing debt, without knowledge of the facts which impeach the title as between the antecedent parties, thereby becomes a holder in the usual course of business, and that his title is complete, so that it will be unaffected by any prior equities between other parties, at least to the extent of the previous debt for which it is used as collateral."

That language would seem to be conclusive of the question under consideration. There was here a present consideration, at the time of the transfer, independent of the indebtedness of the manufacturing company to the bank. That consideration, as to the bank, was the unconditional extension of time upon all the company's indebtedness, for different periods reaching beyond the maturity of the note transferred as collateral security. Such extension for fixed periods was a cardinal element of the contract. The creditor forbore pursuit of the remedies which the law supplied for the enforcement of his demands, then soon to mature, in consideration of collateral security being furnished and in consideration also of the payment by the debtor of usurious interest in advance. Besides, having received the note, indorsed so that it became a party thereto, the bank was bound to observe all the rules of the law-merchant as to the presentation, protest, and notice of non-payment. It did not receive the note as the agent of the debtor and merely for collection. It took it under all the responsibility, as to presentation, protest, and notice of dishonor which attached to absolute ownership, and became liable to have the note treated as payment *pro tanto* if there were a failure to make due presentation, and in the event of non-payment, to give proper notice to the creditor. The debtor could not withdraw his indorsement after delivering the note under the contract for extension, nor could the bank, after receiving the note under that contract, disregard its agreement for forbearance. Nor was the bank any the less bound by the contract for extension because of the payment in advance of usurious interest by its debtor. Although the taking of usurious interest subjected the bank to certain forfeitures prescribed by law, and to an action by the debtor, if he so elected, to recover twice the amount so paid by him, it could not, of its own volition or by its own act, avoid the contract for indulgence because of such payment of usury. The payment in advance was itself a sufficient consideration for the extension, in the sense, that the bank would not be allowed to repudiate its agreement upon the ground that it had taken usurious interest, in violation of law. 2 Dan. on Neg. Inst., § 1817. But independent of that aspect of the case, and throwing out of view

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altogether the usurious feature of the contract, we are of opinion that a creditor who takes a negotiable note, before maturity, so indorsed that he becomes a party to the instrument, as collateral security for a pre-existing debt, and in consideration of an extension of time to the debtor, actually granted, is, according to the law-merchant, a holder for value, and that his rights as such holder cannot be affected by equities between antecedent parties, of which he had no notice. *Goodman v. Simonds*, 20 How. 253 ; 1 Pars. on Notes and Bills, 221-228 ; Story on Prom. Notes, § 195, notes, 7th ed., by Thorndike ; 1 Dan. on Neg. Inst. (2d ed.), §§ 820 and 832, and notes ; Lead. Cas. upon Bills of Ex. and Prom. Notes by Redfield and Bigelow, 186-217, and notes. Whether the taking of such note merely as collateral security for antecedent debts, without any binding contract for indulgence, would constitute a valuable consideration within the established rules of commercial law, protecting the creditor against defenses or equities between antecedent parties, of which he had no notice, it is not necessary now to decide. That precise question is not presented in this case, and we forbear to express any opinion upon it.

3. One other question remains to be considered. Counsel for plaintiff in error have pressed, with much vigor, the suggestion that the bank, consistently with public policy, should not be regarded as a *bona fide* holder for value of the note in suit, since the contract under which it received the note involved in its execution a direct violation of the statutes against usury. We are referred in support of that position to several decisions of the Supreme Court of Alabama which, it must be conceded, announce the broad doctrine that one "who has become the indorsee of a bill, by violating the provisions of a statute, cannot with any degree of propriety be said to be a *bona fide* holder in the usual course of trade." 13 Ala. 410 ; 14 id. 688 ; 16 id. 406. Without extending this opinion by a critical examination of those cases, we repeat that in the determination of such a question we are not bound by the decisions of the State court. The question is one of general law, and depends in nowise for its solution upon local laws and usages.

We are referred, in this connection, to two cases in this court —

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Levy v. Gadsby, 3 Cr. 180, and *Gaither v. Farmers and Mechanics' Bank*, 1 Pet. 41. The case in 3 Cr. is so meagerly reported that it is difficult to see the precise ground upon which the conclusion of the court was rested. That in 1 Pet. is clearly distinguishable from this case. There a note was indorsed and delivered as collateral security for a pre-existing debt, evidenced by a note given on an usurious contract. The case was held to be governed by the statute of Maryland, which declared "all bonds, contracts and assurances whatever, taken on an usurious contract," to be utterly *void*. Under that statute the contract of indorsement was held to be void. In the eye of the law it was as though it had never existed, and consequently, no cause of action, it was adjudged, passed to the indorsee.

The case in hand is altogether different. The statute under which the bank was organized, known as the National Banking Act, does not declare the contract, under which the usurious interest is paid, to be *void*.

It denounces no penalty other than a forfeiture of the interest which the note or bill carries, giving to the debtor the right to sue for and recover twice the amount of interest so paid. If we should declare the contract of indorsement void, and consequently, that no right of action passed to the bank on the note transferred as collateral security, an additional penalty would thus be added beyond those imposed by the law itself. "On what principle could this court add another to the penalties declared by the law itself?" *De Wolf v. Johnson*, 10 Wheat. 367; *Barnett v. National Bank*, 98 U. S. 558; 91 id. 29.

Besides, in this case, the forbearance extended to the debtor was not upon the sole consideration of usurious interest paid in advance. It was upon the additional and substantial consideration that the debtor corporation gave collateral security for the payment of indebtedness about to mature, and which it confessed its inability to meet. We have already seen that the transfer of the note, before maturity, as collateral security, and so indorsed that the bank became a party to the instrument, under obligation to make due presentment and give due notice of non-payment, was, itself, a sufficient consideration to constitute the bank a *bona fide*

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holder for value, within the recognized principles of the law-merchant. The presence, then, in the contract under which the note was indorsed and delivered to the bank of an additional consideration — the payment in advance of usurious interest — which the law declares to be vicious and illegal, ought not to destroy the entire contract of indorsement when there is a sufficient consideration, aside from the usury paid, upon which it may rest.

We are of opinion that no error of law was committed by the court below, and the judgment should be affirmed.

It is so ordered.

CASE, Receiver of Crescent City National Bank, v. CITIZENS' BANK OF LOUISIANA.

(100 U. S. 446.)

Transfer of stock — refusal of cashier to permit — limitation — payment of judgment for damages.

B. having duly sold stock of a National bank of Louisiana pledged to him by A., applied to the cashier to have it transferred on the bank books, but the cashier refused, on the ground that A. was indebted to the bank. The bank having failed before the transfer could be enforced, B. brought an action of damages against the receiver. *Held*, (1) that the action was not barred by the statute of limitation of one year ; (2) the cashier having been intrusted by the directors with the duty of transferring the stock of the bank, his refusal was imputable to the bank ; (3) the court below had power to order the receiver to pay the claim, or certify it to the Comptroller.*

ERROR to the Circuit Court of the United States for the District of Louisiana. The opinion states the case.

CLIFFORD, J. Associations formed under the act to provide a National currency are required to enter into articles of agreement specifying the object of the association, and the articles may contain other regulations, not inconsistent with the act, which the association may see fit to adopt for the conduct of their business and affairs. Such an association may make contracts, sue and

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be sued, and complain and defend in any court of law or equity, as fully as natural persons. They may also elect directors, and the board of directors may appoint a president, vice-president, cashier, and other officers, and define their duties. 13 Stat. at Large, 101; Rev. Stats., § 5136; *Knight v. Bank*, 3 Cliff. 429, 431.

Sufficient appears to show that the plaintiff bank discounted for the firm named in the transcript their promissory note in the sum of \$20,000, payable to the order of the bank in thirty days, and that the promisors, to insure the payment of the note, pledged to the holders two hundred and twenty shares of the capital stock of the bank of which the defendant is the receiver, part standing in the name of the debtor firm and part in the name of their senior partner. Authority was given to the pledgees, at the time the stock was pledged, in case the note was not paid at maturity, to sell the shares pledged at public or private sale, the pledgors agreeing to sign all required transfers of the same necessary in the premises.

Payment of the note when it fell due was refused, and the pledgees of the stock having found purchasers for the same at the rate specified in the declaration, requested the bank, of which the defendant is the receiver, for permission to transfer the stock to the purchasers of the same, and the charge is that the bank peremptorily refused the request, on the ground that the promisors of the note were indebted to the bank and that their stock could not be transferred before payment of their indebtedness.

Nothing appears to show when the indebtedness of the pledgors of the stock was contracted to the defendant bank, but it is not alleged that it preceded the pledge of the stock, nor is it claimed that the defendant bank had any lien on the stock for the payment of the alleged indebtedness.

Process was served and the defendant bank appeared and filed a peremptory exception to the declaration: (1) Because the supposed cause of action did not accrue within one year next before the commencement of the suit. (2) Because the petition or declaration does not disclose any cause of action against the defendant.

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Hearing was had and the court overruled the exception. Proceedings now unimportant followed, when the defendant again appeared and filed an answer, denying all the material allegations of the petition. Issue being joined, the parties went to trial and the verdict and judgment were in favor of the plaintiff, and the defendant excepted and sued out the present writ of error.

Since the cause was entered here errors have been assigned to the effect following: (1) That the Circuit Court erred in holding and instructing the jury that the action arose *ex contractu*, and that it was not prescribed by one year. (2) That the Circuit Court erred in instructing the jury that the defendant was liable for the refusal of the cashier to permit the stock to be transferred. (3) That the Circuit Court erred in refusing the two prayers for instruction presented by the defendant. (4) That the Circuit Court erred in ordering the receiver to pay the amount of the judgment or to certify the same to the Comptroller.

By-laws were adopted by the defendant bank, which provide that the stock of the bank shall be assignable only on the books of the bank, subject to the provisions and restrictions of the act of Congress, and that a transfer book shall be kept in which all the assignments of stock shall be made. Certificates of stock signed by the president and cashier may, as the by-laws provide, be issued to stockholders, but the requirement is that the certificate shall state upon the face thereof that the stock is transferable only upon the books of the bank, the further requirement being that when stock is transferred the existing certificates shall be cancelled and returned and that new ones shall be issued.

1. Provision is made by the Code of the State that persons are responsible for the damage they occasion, not merely by their acts but by their negligence, their imprudence, and their want of skill, which is not different in its application to this case from the rule which prevails at common law. Rev. Code La., art. 2315 and 2316.

Whenever an agent violates his duties or obligation to his principal, and loss ensues to the principal, he is responsible therefor,

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says Judge STORY, and is bound to make a full indemnity. STORY on AGENCY (6th ed.), § 217, a.

Actions for injurious words, whether verbal or written, and those for damages caused by animals, or resulting from offenses, or *quasi* offenses, are prescribed by one year in the jurisprudence of the State. Rev. Code La., § 3536. And the first proposition of the defendant is that the Circuit Court erred in holding that the action in this case was not barred by that article of the Code.

Causes of action resulting from offenses or *quasi* offenses are barred by the lapse of one year, and the defendant bank contends that the cause of action set forth in the petition in this case falls within the one or the other of those designations. Argument to show that it was not an offense is certainly unnecessary, as the proposition, if made, would be wholly without merit, from which it follows that the theory must be wholly rejected, unless the act for which the damages are claimed in this case can properly be regarded as a *quasi* offense within the meaning of that provision.

Even suppose the terms of the provision apply to such a cause of action, it is by no means certain that the admission, if made, would benefit the defendant, as the Supreme Court of the State has decided that prescription in respect to a promissory note is interrupted so long as the holder is in possession of collaterals pledged by the maker to secure its payment. *Blanc v. Hertzog*, 23 La. Ann. 199.

Stocks pledged as security for a loan, the same court holds, constitute a standing acknowledgment of the debt which interrupts prescription during the time the securities pledged remain in the possession of the creditor. *Police Jury v. Duralde*, 22 La. Ann. 107; *Bank v. Knapp*, id. 117.

Suppose, however, the claim for damages resulting from the refusal of the bank to transfer the stock must be considered as a cause of action wholly distinct from the note and the collaterals, then it becomes necessary to examine the objections taken by the plaintiff bank to the validity of the defense of prescription. Coming to that defense the plaintiff bank contends that the cause of action does not fall within the rule of prescription by the lapse of a year, because the act which gives rise to the claim was neither

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an offense nor a *quasi* offense within the meaning of that article of the Revised Code. Precisely the same question was presented to the Supreme Court of the State and was decided by that court adversely to the views of the defendant. *Campbell v. Miltenberger*, 26 La. Ann. 72.

Compensation was claimed by the plaintiff in that case for damages occasioned by the defective and improper construction of a fence around his dwelling and premises by the defendant. The prescription of one year was pleaded, setting up the same article of the Code, but the court decided that the rule of prescription of one year only applied to cases arising from damages caused by the commission of an offense or *quasi* offense, and overruled the defense as inapplicable to the case.

Actions arising under the article referred to survive, in case of the death of the injured party, for the space of one year, in favor of the minor children and widow of the deceased. Rev. Code, art. 2315.

Personal actions are not in general prescribed in that State short of ten years, even when the creditor is present, nor short of twenty years if he be absent. Rev. Code, art. 3544.

Many decisions have been made in the State upon the subject, but a few of each of the classes in question will be sufficient to show that the act which gave rise to the cause of action in this case cannot be regarded either as an offense or *quasi* offense within the rules of decision adopted in that State.

Willful trespass in cutting wood upon another man's land and refusing to account for the same, when accused of the act, was held to be prescribed by that provision. *Whitehead v. Dugan*, 25 La. Ann. 419.

Where damages were claimed for the illegal and wrongful seizure of the defendant's property by virtue of an execution against another party, whereby much of the property was lost or destroyed, it was held that the claim for damages fell within the category of that rule. *Lizarde v. Banking Co.*, 25 Ind. 414.

Claim for injuries occasioned by a railroad to individuals, or for the destruction of domestic animals, are held to fall within the same category as charges of *quasi* offenses. But the right to

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recover of a banker for failing to protest a note, whereby the indorser is charged, is only prescribed by ten years. *Eichelberger v. Pike*, 22 La. Ann. 142; Rev. Code, 3544.

So an action against a telegraph company for loss on goods by a mistake in the message may be maintained unless prescribed by ten years. *Lagrange v. Telegraph Co.*, 25 La. Ann. 383.

Cases in great number of a like character might be cited, but it must suffice to refer to one other, which seems to be decisive of the point. *Percy v. White*, 7 Rob. (La.) 513. It was an action by the stockholders against the directors to recover damages for losses sustained through their negligence, fraud, and mismanagement, and the court held that it was not prescribed short of ten years from the acts which were the subject of complaint. Such a case every one must admit is much stronger than the case at bar, as the directors were directly charged as wrong-doers, and as guilty of negligence, fraud, and mismanagement in the performance of their official duties.

Opposed to that the defendant refers to the case of *Taylor v. Graham* as being inconsistent with the prior case, but the court is not inclined to adopt that view, as the notary is a public officer and the charge against him was that of gross negligence in the performance of his official duty. 15 La. Ann. 418.

Promptitude and fidelity are expected of notaries in giving notice of protest in all jurisdictions where that duty is required of those officers, and it cannot be doubted that the court regarded the charge as imputing a *quasi* offense. In the case at bar the demand of transfer was made by the plaintiff bank in behalf of the purchaser of the stock, and the cashier answered that by order of the directors he could not allow the transfer, as the holder of the certificates was indebted to the bank. Instructions from the directors were obligatory upon the cashier, who in point of fact assumed no responsibility. He acted by order of the directors, who for that purpose constituted the bank, it appearing that he merely obeyed their instructions not to transfer any stock whose owner had discounted notes in the bank unpaid.

2. Evidence was introduced by the plaintiffs tending to show that the cashier of the defendant bank was the officer intrusted

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by the directors with the transfer of stock, and they also gave in evidence the note secured by the pledge of the stock, but they gave no other evidence to show that the note was due and unpaid, or that any effort had been made to collect the same of the maker, or that the maker was insolvent, nor was any evidence introduced to show that any thing had occurred to interrupt or suspend prescription.

Both parties having closed, the defendant bank requested the court to instruct the jury that the defendant is not liable for the refusal of its cashier or other officer to transfer the stock, unless he acted in the premises under the authority of the charter or by-laws of the bank, or pursuant to some general or special authority derived from the corporation through its board of directors, but the court refused to give the requested instruction and instructed the jury that if they found that a person representing the plaintiff, having in his possession the certificates of the stock, sent to the defendant bank during the ordinary hours of business and found there the cashier, and that he was the officer customarily intrusted by the directors to make such transfer of stock, and that he, the person having the certificates, demanded the transfer of the cashier, at the same time offering to deliver up the old certificates, and that the cashier refused to allow the transfer, upon the ground that the owner was indebted to the defendant bank, such a refusal was a refusal of the bank.

Compare the instruction given with that requested and it will be seen that the introductory part of the request is fully given in the instruction given to the jury. They were told that if they found that a person representing the plaintiff, having the certificates of the shares in his possession, went to defendant bank and there found the cashier, and that he was the officer customarily intrusted by the directors to make the transfers, which was fully equivalent to the request, though stated in the affirmative and not in the negative form. Unless the jury found all those facts to be true they were not authorized to find a verdict for the plaintiff, and inasmuch as the verdict returned was in favor of the plaintiff, it must be assumed by the appellate court that the entire theory of fact involved in the instruction is proved.

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Suppose that is so, then it is plain that the whole instruction is correct, as it is not controverted that the demand was regularly made, nor that the cashier refused to allow the transfer.

Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice, and course of business conducted by such institutions, and their acts, within the scope of such usage, practice, and course of business, will in general bind the bank in favor of third persons "possessing no other knowledge." *Minor v. Mechanics' Bank*, 1 Pet. 70.

Neither the public at large nor third persons usually have any other knowledge of the powers of a cashier than what is derived from such usage, practice, and course of business, and it would be the height of injustice to hold that the bank as the principal to the cashier may set up their secret and private instructions to the officer, limiting his authority in respect to a particular case, and thus to defeat his acts and transactions as such agent, when the party dealing with him had not and could not have any notice of the secret instructions. Story on Agency (6th ed.), 127.

Such an officer is *virtute officii* intrusted with the notes, securities, and other funds of the bank, and is held out to the world by the bank as its general agent for the transaction of its affairs, within the scope of authority, evidenced by such usage, practice, and course of business.

Where the by-laws of a bank require that the transfer of the shares of the capital stock shall be entered in the books of the bank, the entry is usually made by the cashier, and the evidence introduced by the plaintiff tended to show that the practice of the defendant bank was in accordance with the general usage. Evidence to that effect having been introduced, it was certainly competent for the court to submit it to the jury, and the judge might have instructed them that, in view of that evidence, they would be warranted, if they believed the testimony, in finding that the cashier had the authority to make the transfer. *Wild v. Bank*, 3 Mason, 505.

Official acts may be performed by a cashier which constitute the ordinary and customary functions of such an officer, and persons dealing with the bank are warranted in believing that the

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cashier is duly authorized to perform any customary duty falling within the scope of that category, and may to that extent hold the bank responsible, as if he was so authorized, however the fact may be, save only in cases where his want of authority is affirmatively proved, and actual knowledge of that fact is brought home to the third party.

Concede that and it follows that the cashier, unless the charter or by-laws of the bank forbid it, may properly make or superintend the transfer of shares of the capital stock, and that a person howing a *prima facie* legal right to claim such a transfer to himself may demand it from that officer or any other principal officer left in general charge and superintendence of the bank, during the regular hours appointed by the bank for the transaction of banking business. *Smith v. Bank*, 4 Cush. 1, 11; *Morse on Banking* (3d ed.), 155, 177.

Authority to show that the acts of a cashier or other officer of a bank, within the scope of the general usage, practice, and course of business of banking institutions, are binding on the corporation in favor of third persons transacting business with it, are quite numerous, provided it appears that the persons dealing with the officer did not know at the time that he was transcending his authority. *Lloyd v. Bank*, 15 Penn. St. 172; *Bank v. Warren*, 7 Hill, 91; *Franklin Bank v. Rice*, 37 Me. 519, 522.

It may be fairly presumed, says Chancellor WALWORTH, that the principal officer or clerk in attendance at the bank during the usual hours of business is authorized to permit the transfer of shares when the case presented is one proper to be allowed. *Bank v. Kortright*, 22 Wend. 347, 350.

Assumpsit in the form of a special action on the case will lie against a corporation for improperly refusing to make a transfer of shares of capital stock, in the name of the party injured by the refusal. *Angel & Ames on Corp.* (9th ed.), § 381; *Kortright v. Bank*, 20 Wend. 91.

Enough has already been remarked to show that it is immaterial whether the declaration or petition is regarded as an action *ex contractu* or *ex delicto*, as it is clear that it is not barred by the prescription of one year, so that the point in any view cannot

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avail the defendant bank. *Ware v. Barrataria Co.*, 15 La. 170 ; *Elling v. Bank*, 7 Rob. (La.) 459 ; *Railroad v. Harris*, 2 La. Ann. 129.

No further remarks are required to show that the refusal of the court to grant the first prayer of the defendant was not error, in view of the instruction given, as that given was quite as favorable to the defendant as the law would allow. Nor is there any just ground of complaint on the part of the defendant that the court refused to give the third request. Instead of giving that, the court instructed the jury that in order to enable the plaintiff to recover, they, the jury, must be satisfied from the evidence that the debt of the owners of the stock was still due and unpaid, and that if that has not been established the jury must find for the defendant.

Comment upon these instructions is needless, as it is clear that the verdict finds that the note is still unpaid.

Exceptions not assigned for error will be passed over without remark as not necessarily re-examinable in this court.

Nothing appears in the case to show that the defendant bank ever adopted any by-law providing for a lien on the shares of a stockholder in case of his indebtedness to the bank, nor is it even shown in this case that the debt, if any, of the owners of the shares to the bank was contracted before the stock was pledged to the plaintiff, nor is there any thing given in evidence by the defendant to show that it was inequitable for the plaintiff to claim the benefit of the collaterals which the bank held to secure the payment of the note they discounted for the owners of the stock.

Beyond all doubt the validity of their debt is established by the verdict and judgment; and if so, it requires neither argument nor authorities to show that the order given by the Circuit Court to provide for the payment of the amount recovered was proper and correct.

Judgment affirmed.

PEOPLE EX REL. WILLIAMS V. WEAVER.*

(100 U. S. 536.)

Taxation of shares.

The provision of the National Bank Law that State taxation on the shares of the banks shall not be at a greater rate than is assessed on other money capital in the hands of citizens of the State, has reference to the entire process of assessment, and includes the valuation of the shares as well as the ratio of percentage charged on such valuation.

A statute of a State, therefore, which establishes a mode of assessment by which the shares of the National banks are valued higher in proportion to their real value than other money capital, is in conflict with the act of Congress, though no greater percentage is levied on that valuation than on the valuation of other moneyed capital.

The statute of New York of 1866, which permits a debtor to deduct the amount of his debts from the valuation of all his personal property, including moneyed capital, except his bank shares, taxes these shares, at a greater rate than other moneyed capital, and is therefore void as to the shares of National banks.

IN error to the Court of Appeals of the State of New York.
The opinion states the facts.

MILLER, J. The law of the State of New York for taxation in the county of Albany, enacted in the year 1850, contained the following section :

"SEC. 9. If any person shall, at any time before the assessors shall have completed their assessments, make affidavit that the value of his real estate does not exceed a certain sum, to be specified in such affidavit, or that the value of the personal estate owned by him, after deducting his just debts, and his property invested in the stock of any corporation or association liable to be taxed therefor, does not exceed a certain sum, to be specified in the affidavit, it shall be the duty of the board of assessors to value such real or personal estate, or both, as the case may be, at the sum specified in such affidavit and no more."

In the year 1866 the legislature of that State enacted on this subject another law, the first section of which reads as follows :

"SEC. 1. No tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of this State, or of

*See Thomp. N. D. Cas. 776.

People ex rel. Williams v. Weaver.

the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein; said shares shall be included in the valuation of the personal property of such stockholder in the assessment of taxes at the place, town, or ward where such bank or banking association is located, and not elsewhere, whether the said stockholder reside in said place, town or ward, or not, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State. And in making such assessment there shall also be deducted from the value of such shares such sum as is in the same proportion to such value as is the assessed value of the real estate of the bank or banking association, and in which any portion of their capital is invested, in which said shares are held, to the whole amount of the capital stock of said bank or banking association. And provided, further, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association; but the same shall be subject to State, county, municipal and other taxation, to the same extent and rate and in the same manner as other real estate is taxed."

The defendants in error constituted the board of assessors of the city of Albany, for the year 1875, and assessed against the plaintiff for taxation, the sum of \$38,250, on account of shares owned by him in the National Albany Exchange Bank, organized under the General Banking Act of Congress. He appeared before this board in due time and demanded the reduction of this sum to the amount of one dollar, and accompanied the demand with this affidavit:

"CITY AND COUNTY OF ALBANY, ss.:

"I, Chauncey P. Williams, being duly sworn, do depose and say that the value of personal estate owned by me, including my bank stock, after deducting my just debts and my property invested in the stock of corporations or associations liable to be taxed therefor, and my investments in the obligations of the United States, does not exceed the sum of one dollar.

"C. P. WILLIAMS.

"Subscribed and sworn before me, }
this 28th day of September, 1875. }

"JAMES MAHER, *Notary Public*."

The defendants refused to make this deduction, and under the procedure in the courts of New York, which allows of an amicable suit on an agreed statement of facts, the case finally came to the Court of Appeals of that State. The judgment there being in favor of defendants, the plaintiff brings the record to this court

by writ of error. Three questions were raised and decided in the Supreme Court, and its judgment affirmed in the Court of Appeals. They are thus stated in the record:

"The case coming on for argument on the submission thereof, after hearing Mr. Hale, of counsel for relator, and Mr. Peckham, of counsel for defendants, the court decides:

"1st. That it was not the duty of the defendants, as assessors of the city of Albany, to comply with the demand made by said relator, and reduce his assessments to the sum of one dollar, and answers the first question submitted in the negative.

"2d. That under the law of the State of New York, referred to in the second question, and passed April 23, 1866, the defendants, as such assessors, were justified in refusing to reduce the relator's assessment on his shares of bank stock mentioned in said submission to the sum of one dollar, and answers the second question in the affirmative.

"3d. That the said law of the State of New York, passed April 23, 1866, is not in violation of any law of the United States relating to the amount of taxes on shares of National banking associations, and answers the third question submitted in the negative.

"Judgment is, therefore, ordered for the defendants against the relator, with costs."

Of the second of these propositions this court has no jurisdiction, but must accept the decision of the highest court of the State that the act of 1866 took the money invested in bank shares out of the general provision of the law of 1850, which allowed a deduction of the debts owing by the shareholder from the value of the personal property, as a basis for laying the tax. In that respect we are bound by the decision of the Court of Appeals as the true construction of the State statute. The first proposition is but the necessary result of the case, if the other two are decided in favor of defendants by that court. We have thus left for our consideration the third proposition, which being decided against a right asserted by plaintiff under the act of Congress establishing the National banking system, presents a question reviewable by this court. We proceed to consider it.

The Court of Appeals delivered no formal opinion in the present case, but in the entry of their judgment, which is part of the record, they say: "This judgment is upon the authority of the former decision of this court rendered in the case of *People v. Dolan*, 36 N. Y. 59." (Thomp. N. B. Cas. 684.)

The opinion in that case is before us, and it decides directly the question now presented, and if sound it justifies the judgment of the court in this case. We have given it the careful consideration which the high character of the court demands at our hands. The question arises on the provision of the National Bank Law concerning taxation of the shares of the banks, which is thus expressed in section 5219 of the Revised Statutes, in force at the time of this assessment: "Nothing herein shall prevent all the shares in any association from being included in the valuation of personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State, within which the association is located, * * * subject only to the two restrictions, that taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere."

It cannot be disputed — it is not disputed here — nor is it denied in the opinion of the State court, that the effect of the State law is to permit a citizen of New York who has moneyed capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stocks can make no such deduction. Nor can it be denied that inasmuch as nearly all the banks in that State and in all others are National banks, the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot. That this works a discrimination against the National bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt. The

question we are called to decide is whether Congress, in passing the act which subjected these shares to taxation, by the State, intended by the very clause which was designed to prevent discrimination between National bank shares and other moneyed capital, to authorize such a result.

That the provision which we have cited was necessary to authorize the States to impose any tax whatever on these bank shares is abundantly established by the cases of *McCulloch v. State of Maryland*, 4 Wheat. 316; *Weston v. City of Charleston*, 2 Pet. 449; *Osborne v. United States Bank*, 9 Wheat. 738.

As Congress was conferring a power on the States which they would not otherwise have had, to tax these shares, it undertook to impose a restriction on the exercise of that power, manifestly designed to prevent taxation which should discriminate against this class of property as compared with other moneyed capital. In permitting the States to tax these shares, it was foreseen — the cases we have cited from our former decisions showed too clearly — that the State authorities might be disposed to tax the capital invested in these banks oppressively.

This might have been prevented by fixing a precise limit in amount. But Congress, with due regard to the dignity of the States, and with a desire to interfere only so far as was necessary to protect the banks from any thing beyond their equal share of the public burdens, said, you may tax the real estate of the banks as other real estate is taxed, and you may tax the shares of the bank as the personal property of the owner, to the same extent you tax other moneyed capital invested in your State. It was conceived that by this qualification of the power of taxation equality would be secured and injustice prevented.

That such was the intent of Congress can admit of no doubt. Have they given expression to that intent so that courts can see and enforce it, or have they expressed themselves so unfortunately that the States may, by a narrow interpretation of the act of Congress and by skillfully framed statutes of their own, exercise the power thus granted so as not only to reap its full benefit, but at the same time cause the burden of supporting the State govern-

ment to fall with unequal weight on the subject of taxation thus surrendered to it by the National government?

The argument by which this view is supported is founded on the assumption that while Congress limited the State authorities in reference to the ratio or percentage levied on the value of these shares, which could not be greater than on other moneyed capital invested in the State, it left the matter of the relative valuation of the shares and of other moneyed capital wholly to the control of State regulation. The State can therefore adopt any arbitrary or conventional system of valuation as a basis of taxation, however unequally or unjustly it may operate, and however it may discriminate against bank shares, provided the percentage of the tax levied in this valuation is the same in all cases. If for instance the tax is two per cent on all personal property, the argument is that the act of Congress is not violated, if the valuation on the money of the citizen invested in State bonds is by statute one-half its real value, and that on bank shares is its full value, or as in the statute of the State now under consideration, the tax payer is allowed an exemption from taxation in whole or in part, as regards his State bonds, while none is allowed in reference to bank shares.

"Taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals." Seizing upon the word *rate* in this sentence as if disconnected from the word "assessment," and construing it to mean percentage *on any* valuation that might be made, the Court of Appeals arrive at the conclusion, that since that percentage is the same in all cases, the act of Congress is not infringed. If this philological criticism were perfectly just, we still think the manifest purpose of Congress in passing this law should prevail. We have already shown what that was. But the criticism is not sound. The section to be construed begins by declaring that these shares may be "included in the valuation of the personal property of the owner, in assessing taxes imposed by authority of the State within which the association is located." This *valuation*, then, is part of the *assessment* of taxes. It is a necessary part of every assessment of taxes which is governed by a ratio or percentage. There can be no rate or percentage without a valuation. This taxation, says the act, shall not be

at a greater rate than is assessed on other moneyed capital. What is it that shall not be greater? The answer is taxation. In what respect shall it not be greater than *the rate assessed* upon other capital? We see that Congress had in its mind an *assessment*, a *rate of assessment* and a *valuation*, and taking all these together the taxation on these shares was not to be greater than on other moneyed capital.

“When taxes have been properly decided upon, an assessment may become an indispensable proceeding in the establishment of any individual charge against either person or property. This is always requisite when the taxes are to be levied in proportion to an estimate either of values, of benefits, or the results of business.” “An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists in the two processes of *listing* the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them. * * * Taxation by valuation cannot be apportioned without it.” Cooley on Taxation, 258-9; Burroughs on Taxation, 198, § 94. So, also, Judge BOUVIER defines assessment to be determining the value of a man's property or occupation for the purpose of levying a tax. *Determining the share of a tax to be paid by each individual.* Levying a tax. 1 Bouvier, 154. These definitions show that in the best use of the language employed by Congress we are justified in looking to the rule of valuation adopted by the State in assessing taxes on these shares, as well as to the uniformity of percentage to ascertain whether the Congressional restriction has been violated.

It is said, however, that the judgment of the State court is supported by the decision of this court in the case of *People v. Commissioners*, 4 Wall. 244; Thomp. N. B. Cas. 9. The specific question now before us was not involved in that case. The only matter before the court was whether the holder of the bank shares was entitled to deduct from their value a due proportion of the sum which the bank had invested in government bonds. This was decided in

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the negative, and it is all that was decided or could be decided. The sentence in Judge NELSON's opinion, on which the argument is founded, reads thus : " The answer is, that upon a true construction of this clause of the act, the meaning and intent of the law makers were that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens."

If we give to the phrase " rate of taxation " in this sentence no more than its proper force, and if we observe that the learned judge speaks of the proportion of percentage *in* the valuation, not *on* it, as it is misquoted, we have the idea which we have already supposed to be the true one in the minds of the law makers. However this may be, we feel quite sure that the question of limiting the effect of the act of Congress to a discrimination in the percentage levied as a tax, without regard to equality in the valuation on which that tax was levied, was not before the court, and was not intended to be decided. And in our view, such a proposition is untenable.

We are therefore of opinion that the statute of New York, as construed by the Court of Appeals, in refusing to plaintiff the same deduction for debts due by him, from the valuation of his shares of National bank stock, that it allows to those who have moneyed capital otherwise invested, is in conflict with the act of Congress, and the judgment of that court is reversed and the case remained for further proceedings, in conformity to this opinion.

 FIRST NATIONAL BANK OF CARLISLE V. GRAHAM.*

(100 U. S. 669.)

Liability for loss of special deposits.

A National bank received for safe-keeping government bonds belonging to G. From time to time the cashier of the bank cut off the coupons and collected the same, placing the amount to the credit of G., paying it to him when

* Affirming, Thomp. N. B. Cas. 773.

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demand. For this service the bank received no compensation. Through the gross negligence of the bank or its officers the bonds were lost. *Held*, that the bank was liable.

It is competent for a National bank to receive special deposits of securities, either on a contract of hiring, or without reward, and it will be liable for their loss through its negligence. (See note, p. 69.)

IN error to the Supreme Court of the Commonwealth of Pennsylvania. The opinion states the case.

SWAYNE, J. The capital stock of the bank was \$500,000, divided into 500 shares of \$1,000 each. From November 9, 1869, Samuel Hepburn, the president, owned 460 shares. His son, C. H. Hepburn, was the cashier, and he and Hopewell Hepburn, another son, and a director, owned ten shares each. From October 19, 1871, H. M. Hepburn, also a son and director, owned 10 shares. John G. Orr, the teller and a director, owned the remaining 10 shares. With one exception, these persons were directors from the year 1870. In 1867 the defendant in error had \$4,000 of 7.30 bonds of the United States deposited in the bank for safe-keeping. They were called in by the government, and at her request the cashier had them converted into the same amount of 5.20 bonds. These also were left in the bank for safe-keeping. The cashier gave her a receipt, dated October 22, 1868, setting forth this fact and that the bonds were to be returned on the return of the receipt. The cashier cut off the coupons and collected them and placed the proceeds to her credit on the books of the bank and paid her the amount as it was demanded. She kept an account with the bank. Before and after the times mentioned the officers of the bank were accustomed to receive such deposits from others in the same way and for the same purpose. They were entered in a book kept by the bank. The fact of their being such deposits was frequently spoken of by the directors at meetings of the board. Some of the directors and quite a number of other persons had such deposits in the bank. No compensation was expected or received by the institution. It was a bailee without reward. The bank alleged that on the 5th of August, 1871, the bonds of the defendant in error were stolen from its vault.

She did not learn the fact until some two or three weeks afterward. She heard that some other securities belonging to her and so deposited had been stolen, and upon inquiry at the bank, was told that those securities had been found upon a neighboring highway and had been returned, but that her government bonds had been stolen also and had not been recovered. She was requested to say nothing about their loss, and was assured that the interest should be regularly paid to her, and that the value of the bonds should also be made good, so that she should not be a loser. The interest was accordingly paid up to the 1st of July, 1873, inclusive. This suit was brought to recover the value of the bonds.

The defendant in the court below asked the court to instruct the jury that the bank, being a corporation chartered under the National Banking Laws, "was not authorized to receive bonds and valuables for safe-keeping;" that "the act of the cashier in taking the bonds of the plaintiff was not within the scope of his powers and duties as cashier; and therefore did not bind the bank, and that the plaintiff could not recover." This instruction the court refused to give, and the defendant excepted.

The jury was instructed that "to justify a recovery against the defendant in this case, they must be satisfied from the evidence that the plaintiff's bonds were received for safe-keeping with the knowledge and acquiescence of the officers and directors of the bank, and that if the bonds were lost by the gross negligence of the bank or its officers, the bank was liable." The defendant again excepted. A verdict was rendered for the plaintiff. The jury thus found and affirmed the facts of knowledge and gross negligence by the bank. These points are therefore conclusively established and are not open to inquiry.

Conceding for the moment that the contract was illegal and void for the reason alleged in behalf of the bank, the consequence insisted upon would by no means follow. There was no moral turpitude on either side — certainly none on the part of the depositor. She was entitled at any time to reclaim the securities. The bank was bound in good faith and in law to return them or to keep them without gross negligence until they were called for. If, when applied for, they were refused, it cannot be doubted that

they, or their value, according to the form of action adopted, might have been recovered. *White v. Franklin Bank*, 22 Pick. 181. If the bank had destroyed them or had thrown them into the street, whereby they were lost to the plaintiff, the liability of the bank would have been the same. To have kept them with gross negligence, whereby the same consequence to the plaintiff was incurred, involved necessarily the same result to the depository. The only way of escape from liability open to the latter would have been to return the property to the owner or to get rid of its possession otherwise in some lawful way. Gross negligence on the part of a gratuitous bailee, though not a fraud, is in legal effect the same thing. *Foster v. Essex Bank*, 17 Mass. 479. It is a tort, and an action on the case is the appropriate remedy for such a wrong. In many cases where there is a valid contract, it may be regarded only as inducement and as raising a duty, for the breach of which an action may be brought *ex contractu* or *ex delicto*, at the option of the injured party. 1 Ch. Pl. 151.

Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application.

They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. *Merchants' Bank v. State Bank*, 10 Wall. 645. An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the objects of its creation or beyond its granted powers. It may be used for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel. In certain cases it may be indicted for misfeasance or non-feasance touching duties imposed upon it in which the public are interested. Its offenses may be such as will forfeit its existence. *P. W. & B. R. R. Co. v. Quigley*, 21 How. 209; 2 Wait's Actions and Defenses, 337, 338, 339; Angell & Ames on Corp., §§ 186, 385; Cooley on Torts, 119, 120.

Recurring to the case in hand, it is now well settled that if a bank be accustomed to take such deposits as the one here in ques-

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tion, and this is known and acquiesced in by the directors, and the property deposited is lost by the gross carelessness of the bailee, a liability ensues in like manner as if the deposit had been authorized by the terms of the charter. *Foster v. Essex Bank*, 17 Mass. 479; *Lancaster Co. National Bank v. Smith*, 62 Penn. St. 47; *Scott v. National Bank of Chester Valley*, 72 id. 471; s. c., 17 Am. Rep. 711; Thomp. N. B. Cas. 864; *First Nat. Bank of Carlisle v. Graham*, 79 Penn. St. 106; s. c., 21 Am. Rep. 49; Thomp. N. B. Cas. 875; *Turner v. First Nat. Bank of Keokuk*, 26 Iowa, 562; Thomp. N. B. Cas. 454; *Smith v. First Nat. Bank of Westfield*, 99 Mass. 605; *Chattahooche Nat. Bank v. Schley*, 58 Ga. 369; Thomp. N. B. Cas. 375. The only authorities in direct conflict with these adjudications, to which our attention has been called, are *Wiley v. Nat. Bank of Vermont*, 47 Vt. 546; s. c., 19 Am. Rep. 122; Thomp. N. B. Cas. 905; and *Whitney v. Nat. Bank of Brattleboro*, 50 Vt. 389; s. c., 28 Am. Rep. 508.

The case first cited (*Foster v. Essex Bank*) was argued exhaustively by the most eminent counsel of the time and decided by a court of great judicial learning and ability. Their opinion is marked by careful elaboration.

The special deposit there was a cask containing gold coin. While it was maintained that the bank would have been liable for its loss by gross negligence, it was held that such negligence in that case had not been shown.

Here gross negligence is conclusively established. The depositor kept an account in the bank. The cashier cut off and collected the coupons and placed the proceeds to her credit. The bonds therefore entered into the legitimate and proper business of the institution. But it is unnecessary to pursue this view of the subject further, because we think there is another ground free from doubt upon which our judgment may be rested.

The 46th section of the Banking Act of 1864, re-enacted in the Revised Statutes of the United States, § 5228, declares that after the failure of a National bank to pay its circulating notes, etc., "it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or other-

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wise prosecute the business of banking, except to receive and safely keep moneys belonging to it, *and to deliver special deposits.*" This implies clearly that a National bank, as a part of its legitimate business, may receive *such* "*special deposits*," and this implication is as effectual as an express declaration of the same thing would have been. *United States v. Babbit*, 1 Black, 61.

The phrase "*special deposits*," thus used, embraces deposits such as that here in question. *Patterson v. Syracuse Nat. Bank*, Court of Appeals, New York (recently decided and not yet reported).^{*} In that case it was said, "a reference to the history of banking discloses that the chief, and in some cases the only deposits received by the early banks were special deposits of money, bullion, plate, etc., for safe-keeping and to be specifically returned to the depositor; and such was the character of the business done by the Bank of Venice (the earliest bank) and the old Bank of Amsterdam, and the same business was done by the Goldsmiths of London and the Bank of England, and we know of none of the earlier banks where it was not done."

It would undoubtedly be competent for a National bank to receive a special deposit of such securities as those here in question either on a contract of hiring or without reward, and it would be liable for a greater or less degree of negligence accordingly.

We do not mean that it could convert itself into a pawnbroker's shop. That subject involves topics alien to the case before us and which in this opinion it is unnecessary to consider.

The judgment of the Supreme Court of the Commonwealth of Pennsylvania is affirmed.

NOTE BY THE REPORTER.—We give below the main portion of the opinion in *Whitney v. National Bank*, disapproved in the principal case:

"The case as now presented is substantially the same as before. The only difference between the case as then and now before the court is this: the plaintiff, upon the last trial in the county court, produced several additional witnesses, whose testimony tended to prove that the cashier of the

defendant bank was in the habit of receiving special deposits of United States government bonds for safe-keeping, and keeping them in the vault of the bank for the benefit of the owners or depositors, without charge to them, and that such habit, or usage, was known to the directors, and not objected to by them.

The defendant is a banking corporation, incorporated pursuant to the act of Congress, entitled 'An Act to pro-

^{*} *Post*.

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vide a National Currency,' etc., approved June 3, 1864. It was conceded by the learned counsel for the defendant, that if the bank had the power and authority conferred upon it by the act of Congress to become a party to the alleged contract of bailment as depositary, then by the act of its cashier, in receiving and keeping the bonds in question in the manner it was done in this case, the bank became subject to the duties and liabilities of that relation to the plaintiff.

This proposition was not questioned in *Wiley v. Bank*, *supra*. WHEELER, J., who delivered the opinion of the court in that case, says: 'There is no controversy, and could not probably be any, but that if the taking of these bonds, to keep, as they were taken by the cashier, was within the scope of the corporate business of the bank, then the bank did become the depositary of them and subject to the liabilities of that relation.' But we have no occasion to consider or decide this question. The court held, when this case was before them in 1875, that the acceptance of such a bailment was beyond the scope of the corporate powers of the bank, and hence the defendant was not subject to the liabilities of a depositary of the bonds in question. It therefore follows that the usage of the cashier, with the approval of the directors, could not confer upon the bank this power. The directors are trustees of the shareholders, and their authority is limited by the act of Congress in question, to such powers as are thereby directly conferred upon them, and such, in addition thereto, as are necessarily incidental to the business of banking.

Although this action is in form *ex delicto*, so far as it rests upon contract, it is governed by the same rules as though *ex contractu*; and it was so held in *Wiley v. Bank*, *supra*."

[Omitting a discussion of the form of the action.]

"We might well stop here, and affirm

the judgment of the county court. But a very able and ingenious argument has been made by the learned counsel for the plaintiff, to show that *Wiley v. Bank*, *supra*, ought to be overruled; and numerous cases have been cited which, it is claimed, are in conflict with it; among which are *Foster v. Essex Bank*, 17 Mass. 479; *Coffee v. Bank*, 45 Mo. 140; s. c., 2 Am. Rep. 488; *Thomp. N. B. Cas.* 644; *Leach v. Hale*, 31 Iowa, 69; s. c., 7 Am. Rep. 112; *Scott v. Nat. Bank of Chester*, 72 Penn. St. 471; s. c., 13 Am. Rep. 711; *Thomp. N. B. Cas.* 864; *First National Bank v. Graham*, 79 Penn. St. 106; s. c., 21 Am. Rep. 49; *Thomp. N. B. Cas.* 875; and *Chattahooche National Bank v. Schley*, 58 Ga. 269; s. c., *Thomp. N. B. Cas.* 379. But owing to the importance of this question to the public, we thought it behooved us to examine the cases above cited, to which our attention was specially called in the argument for the plaintiff.

The case of *Foster v. Essex Bank* was ably reviewed by WHEELER, J., in *Wiley v. Bank*, *supra*, and is not in conflict with that case. The Essex Bank was incorporated by that name, with power to contract; but there was no enumeration of its powers in its charter. It always had been the practice of the bank to receive special deposits of money and other valuable property with the knowledge and approval of the directors, as was found by the special verdict of the jury. The court might therefore with propriety, hold as they did, that the corporation and not its officers became the bailee of the special deposit of coin in question; but a large portion of the same having been fraudulently taken from the bank by the cashier and converted to his own use, the bank being a mere depositary, the court also held that the bank was not liable to the depositor for the value of the coin so taken.

Coffee v. Bank was an action brought to recover a special deposit of gold

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which the bank had converted to its own use. No question was made as to the authority of the bank to become the bailee of special deposits of this kind, and the bank was held liable, as it should have been, for the conversion of the gold to its own use.

In *Leach v. Hale*, the cashier advertised that the bank would convert 7-30 United States government bonds into 5-20 bonds without charge. The plaintiff deposited in the bank 7-30 United States bonds to be converted into 5-20 bonds, and thereafter made a demand for the return of one of the other class of bonds, which was refused. The court held that the bank was not a mere mandatary, or bailee, acting without compensation, but was liable to the depositor for the value of the bonds, on its refusal to deliver them on demand; and that the business of receiving one class of United States bonds to be converted into another is within the scope of the powers conferred upon National banks by the act of Congress under which they are organized. The court say: 'The transaction, in the light we are now considering it, amounts to the deposit of certain securities, with an undertaking to return those of a different class, and was within the scope of the general business of the bank.' The court omitted to find, whether, in this particular instance, the bank received compensation, although they found that generally for such business it was in some form compensated. We should also infer, although it is not stated, that the bank converted the bonds in question to its own use, which would make it liable in any event. We cannot see why converting one class of United States government bonds into another class, at the request of the owner, is not one of the 'incidental powers' specifically conferred upon National banks by the 8th section of the act of Congress in question, such bonds being 'evidences of debt.'

In *Scott v. National Bank of Chester*, the court held that the bank, which

was a mere depositary of United States government bonds, without special contract or reward, and having exercised the degree of care bestowed on its own goods, was not liable for the larceny of the deposit, even by its own officers. It was assumed by the plaintiff that the bank itself was the bailee, instead of the officer receiving the bonds, and no question was made as to the authority or powers of the bank to become such bailee, by the defendant's counsel, and the case does not show that that question was ever considered by the court.

The only case we have seen in which this exact question was raised in conflict with *Wiley v. Bank of National Bank v. Graham*, *supra*. In that case the facts are substantially the same as in the case at bar. The court held that 'the mere act of the cashier in receiving the plaintiff's securities would not subject the bank to liability. But if the deposit was known to the directors, and they acquiesced in its retention, a contract relation was created by which the defendants should be held bound.' The court cited *Foster v. Essex Bank*, *supra*, as authority for the above proposition, but made no allusion to the difference between the charter of the Essex Bank and the act of Congress under which the defendant corporation was organized, as to the powers thereby respectively conferred upon each corporation. In the act of Congress the powers of National banks are enumerated. This is not the case with the charter of the Essex Bank; and its powers were to be determined by implication and usage, and were therefore more or less dependent upon the action of its directors. WOODWARD, J., who delivered the opinion of the court in this case, *Bank v. Graham*, says: 'The rule above stated has been uniformly applied by this court in cases involving the rights and duties of National banks. The principle announced in the recent *New York and Vermont*'

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cases—*First Nat. Bank of Lyons v. Ocean National Bank*, 60 N. Y. 278; s. c., 19 Am. Rep. 181; s. c., Thomp. N. B. Cas. 728, and *Wiley v. First Nat. Bank of Brattleboro*, has never been adopted here, so far as it is in conflict with the rule. If the question here had grown out of an act prohibited by law, the principle of these recent authorities would be applicable, as it was applied in *Fowler v. Scully*, 72 Penn. St. 456; s. c., 13 Am. Rep. 699; Thomp. N. B. Cas. 854; but the question arises out of an act which has been neither directly nor impliedly forbidden by statute.

This, we think, is begging the question. The 8th section of the act of Congress, under which National banks are organized, makes them banking corporations, with 'all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this act.'

The 'deposits' here referred to are deposits of money received by banks in the usual course of business, and have none of the qualities of a bailment. The money deposited becomes the property of the bank, and the relation of debtor and creditor is created between the depositor and the bank.

The powers of National banks being enumerated in the act of Congress by which they are created, the maxim, *expressio unius est exclusio alterius*, if applied in the interpretation of this act, would prohibit National banks from entering into such a contract of bailment as the one in question, as a depositary, unless it is an implied power, necessary to carrying on the business of banking. We do not think it is. On the other hand, it would be

hazardous for banks to possess and exercise this power; and it is no more incidental to them than to an insurance company, or a manufacturing company or any other corporation, to receive and keep in their vaults special deposits of securities and other property of great value, for safe-keeping, without compensation, for the benefit of the depositors, and thereby have resting upon them the liabilities of such depositary or bailee.

As was well said by ALLEN, J., in *First National Bank v. Ocean National Bank*, 60 N. Y. 289; s. c., 19 Am. Rep. 181; Thomp. N. B. Cas. 728: 'The deposit of these bonds cannot be distinguished from a deposit of jewelry, or plate, or other valuable property, and was a special transaction, not within the ordinary course and business of banking, or necessarily incident to it. If authorized, it added greatly to the risk of loss to the shareholders, without adding to their gains. It was a holding out of greater inducement to burglars and robbers from without, and might prove of greater temptation to dishonesty on the part of clerks and employees within the bank.' And the learned judge also says, that he fully concurs in the views expressed in the opinion of WHEELER, J., in *Wiley v. Bank*, *supra*.

The views expressed by AGNEW, J., in *Fowler v. Scully*, *supra*, referred to by the learned judge who delivered the opinion of the court in *National Bank v. Graham*, *supra*, hardly sustain the rule laid down by the latter as the law in Pennsylvania upon this subject. The act of Congress, pursuant to which National banks are incorporated, provides in the eighth section for their loaning money on personal security; and also in a subsequent section, that they can purchase and convey such real estate as shall be mortgaged to them in good faith by way of security for debts previously contracted. The validity of a mortgage given to a National bank to secure a loan was the

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question before the court in *Fowler v. Scully*, *supra*.

In the very able opinion of AGNEW, J., in that case, following an enumeration of the powers of National banks contained in the eighth section of the act of Congress in question, we find this language: 'In view of the interpretation of such charters given to us by the Federal courts, and the maxim, *'expressio unius est exclusio alterius'*, the argument might close with the terms of the power to loan money on personal security.'

In the very valuable work of Angell and Ames on Corporations, § 254, we find the following rule for determining what contracts a corporation can make: 'In deciding whether a corporation can make a particular contract, we are to consider in the first place whether its charter, or some statute binding upon it, forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation, as directly or incidentally necessary to enable it to fulfill the purpose of its existence, or whether the contract is entirely foreign to that purpose.'

The act of Congress in question being silent upon this subject, is the power to make the alleged contract implied, on the part of the defendant corporation, as directly or incidentally necessary to enable it to fulfill the purpose of its existence? For the reasons before stated, we think not. In our opinion, the alleged contract of bailment is entirely foreign to that purpose; and if made by or in behalf

of the defendant bank, was *ultra vires*, and imposed no legal obligation or duty upon the corporation as bailee. See *Pearce v. Madison & Indianapolis R. R. Co.*, 21 How. 441; *Vt. & Canada R. R. Co. v. Vt. Central R. R. Co.*, 34 Vt. 47; *Bullard v. Bank*, 18 Wall. 389; *Thomp. N. B. Cas.* 93; *Head & Armory v. Prov. Ins. Co.*, 2 Cr. 187; *Weckler v. First National Bank*, 42 Md. 581; *Thomp. N. B. Cas.* 533; *First National Bank v. Ocean National Bank*, *supra*.

It was claimed in the argument, that the act contemplates receiving both general and special deposits, from the fact that the forty-sixth section makes it lawful for banks, after they have stopped business and while winding up their affairs, 'to deliver special deposits.' But this same point was made in *Wiley v. Bank*, *supra*; and what was said by WHEELER, J., on this point in his very able opinion in that case, fully answers the argument for the plaintiff upon the same point in this case. The term 'special deposits' is generic, and we think, as used in this section, refers only to such class of special deposits as are incidental to the business of banking; for example, money deposited for a specific purpose, as to pay a note or bill of exchange, made payable at the bank.

However much we may dislike to differ with so able a court as the Supreme Court of Pennsylvania, the cases to which we were referred by the learned counsel for the plaintiff, in our opinion, furnish no reason why *Wiley v. Bank*, *supra*, should be overruled. On the other hand, that case still has the approval of all the members of this court."

CUMMINGS V. MERCHANTS' NATIONAL BANK.*

(21 Albany Law Journal, 223.)

Taxation — jurisdiction.

The Constitution of Ohio declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all the real and personal property, according to its true value in money." And the legislature has passed laws providing separate State boards of equalization for real estate, for railroad capital, and for bank shares, but there is no State board to equalize personal property, including all other moneyed capital. The equalizing process as to all other personal property and moneyed capital ceases with the county boards. Throughout a large part of the State of Ohio, including Lucas county, in which the plaintiff bank is located, perhaps all over the State, the officers charged with the valuation of property for purposes of taxation adopted a settled rule or system, by which real estate was estimated at one-third of its true value, ordinary personal property about the same, and moneyed capital at six-tenths its true value. The State board of equalization of bank shares increased the valuation of these shares to their full value. This court holds:

(1.) That the act creating the board for equalizing bank shares is not void as a violation of the Constitution of Ohio, because if the local assessors would discharge their duty by assessing *all property* at its actual cash value the operation of the equalizing board would work no inequality of taxation, and a law cannot be held to be unconstitutional which in itself does not conflict with the Constitution, because of the injustice produced by its maladministration.

(2.) The rule or principle of unequal valuation of different classes of property for taxation, adopted by local boards of assessment, is in conflict with the Constitution of Ohio and works manifest injustice to the owners of bank shares.

(3.) When a rule or system of valuation for purposes of taxation is adopted by those whose duty it is to make the assessment, which is intended to operate unequally, in violation of the fundamental principles of the Constitution, and when this principle is applied not solely to one individual, but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of the unconstitutional exercise of power.

(4.) The appropriate mode of relief in such cases is, upon payment of the amount of the tax which is equal to that assessed on other property, to enjoin the collection of the illegal excess.

*See s. c., Thomp. N. B. Cas. 326.

A PPEAL from the Circuit Court of the United States for the Northern District of Ohio. The opinion states the case.

MILLER, J. The appellee, being a banking association organized under the National Banking Law of the United States, brought in the Circuit Court for the Northern District of Ohio its bill in equity, to restrain the treasurer of Lucas county from collecting a tax wrongfully assessed against the shares of its stockholders, payment of which was demanded of the bank. The feature of the assessment of which plaintiff complains is that in the valuation of the shares of the bank for the purpose of taxation they were estimated at a much larger sum in proportion to their real value than other property, real and personal, in the same city, county, and State, and that this was done under a statute of the State, and by a rule or system deliberately adopted by the assessors for the avowed purpose of discriminating against the shares of all bank stock. Though there is in the argument of counsel an attempt to invoke the aid of the act of Congress relating to the taxation of the shares of the National banks, we are unable to see, either in the original or supplemental bill, any sufficient allegation on that subject. One clause of the bill asserts that the law of the State (which is the principal subject of the complaint), and the tax and assessments under it, are in violation of the Constitution of Ohio and of the act of Congress, but the vice charged against the assessment is that it is "three times the proportionate amount which is charged to real property, moneys, and credits, listed for taxation in said county of Lucas and charged upon said duplicate."

The standard of comparison in the act of Congress is, "other moneyed capital in the hands of individual citizens of the State." We do not think we are called on to decide whether a tax which is assailed on the ground of violating that statute is void for that reason until the case, by positive averment, or by necessary implication of such averment, is shown to be within the prohibitory clause.

But the bank has the same right under the laws and Constitution of Ohio to be protected against unjust taxation that any citi-

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zen of that State has, and by virtue of its organization under the act of Congress it can go into the courts of the United States to assert that right; so that if the assessment on its shares was a violation of the constitutional provision of that State concerning uniformity of taxation, the Circuit Court had jurisdiction of that question, concurrent with the State courts, and we must review its decision.

It is however manifest from the form of the bill in this case and the tenor of the argument in this court, that its object is to have a decision that the State statute of 1876, which provides specifically for taxation of bank shares, and for nothing else, is void as a violation of the Constitution of that State, as the purpose of the suit against the treasurer of Cuyahoga county by the bank at Cleveland is designed to test the subsequent statute of 1877, which is a substitute for that of 1876.

The two cases were advanced on our docket out of their order and heard at the same time by this court, on the ground that they both involved the revenue law of the State. We have expressed in that case the reasons which induced us to avoid deciding that question if it can be done without prejudice to the rights of the parties involved, and we shall see as we progress in the examination of this case whether it can be done.

But we must dispose of some preliminary questions, the first of which is the supposed incapacity of the bank to sustain this or any other action for the alleged grievance, because as the persons taxed are the individual shareholders, the damage, if any, is theirs, and they alone can sue to recover for it or to prevent its collection.

The statutes of Ohio under which the taxes are assessed require the bank officers to report to the county auditor who makes the original assessment, the names of all its stockholders, their places of residence, and the amount held by each of them, and all the other facts necessary to a fair assessment.

It also authorizes the bank to pay the tax on the shares of its stockholders and deduct the same from dividends or any funds of the stockholders in its hands or coming afterward to its possession, and it forbids the bank to pay any dividends on such stock or to

transfer it or permit of its transfer on their books so long as the tax remains unpaid.

In the case of *National Bank v. Commonwealth of Kentucky*, we held that a statute of Kentucky, very much like this, which enabled the State to deal directly with the bank in regard to the tax on its shareholders, was valid, and authorized a judgment against the bank which refused to pay the tax. 9 Wall. 353; Thomp. N. B. Cas. 34. It is true, the statute of Kentucky went further than the Ohio statute, by declaring that the bank *must* pay the tax, while the latter only says it may. But the Ohio statute, by the remedies it provides, places the bank in a condition where it must pay the tax or encounter other evils of a character which creates a right to avoid them by instituting legal proceedings to ascertain the extent of its responsibility before it does the acts demanded by the statute.

It is next suggested that since there is a plain, adequate, and complete remedy by paying the money under protest and suing at law to recover it back, there can be no equitable jurisdiction of the case.

The reply to that is that the bank is not in condition where the remedy is adequate. In paying the money it is acting in a fiduciary capacity as the agent of the stockholders—an agency created by the statute of the State. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank, as a corporation, is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends, and subject itself to litigation by doing so, or refuse to obey the laws and subject itself to suit by the State. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it. To prevent multiplicity of suits, equity may interfere.

But the statute of the State expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them. Section 5848 of the Revised Statutes of

Ohio, 1880, 53 vol. Laws of Ohio, 178, §§ 1, 2. And though we have repeatedly decided in this court that the statute of a State cannot control the mode of procedure in equity cases in Federal courts, nor deprive them of their separate equity jurisdiction, we have also held that where a statute of a State created a new right or provided a new remedy, the Federal courts will enforce that right either on the common law or equity side of its docket, as the nature of the new right or new remedy requires. *Van Norden v. Morton*, 99 U. S. 380. Here there can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute, is to be enforced, and can only be appropriately enforced in the equity side of the court.

The statute also answers another objection made to the relief sought in this suit, namely, that equity will not enjoin the collection of a tax except under some of the well-known heads of equity jurisdiction, among which are not a mere overvaluation, or illegality of the tax, or in any case where there is an adequate remedy at law. The statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed, as well as for an action to recover back such taxes when paid, showing clearly an intention to authorize both remedies in such cases.

Independently of this statute, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case made by this bill, and if supported by the testimony, relief ought to be given.

Article XII, section 2, of the Constitution of the State of Ohio declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all the real and personal property, according to its true value in money;" and section 3, that "the general assembly shall provide by law for taxing the notes and bills discounted or purchased, moneys loaned, and all other prop-

erty, effects, or dues of every description — without deduction — of all banks now existing, or hereafter created, and all bankers, so that all property employed in banking shall bear a burden of taxation equal to that imposed on the property of individuals.”

In construing this provision of the Constitution the Supreme Court of Ohio has said that “taxing by a uniform rule requires uniformity, not only in the *rate* of taxation, but also uniformity in the *mode of the assessment* upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of the assessment, as well as in the rate of taxation. But this is not all. The uniformity must be co-extensive with the territory to which it applies. If a State tax, it must be uniform over all the State; if a county, town, or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the Constitution does not stop here. It must be extended to *all property* subject to taxation, so that all property must be taxed alike, *equally*, which is taxing by uniform rule.” *Exchange Bank of Columbus v. Hines*, 3 Ohio St. 15.

We are not aware that this decision has ever been overruled. It will be seen also that the Constitution requires all property to be taxed “according to its true value in money.” It is said that the various statutes for assessing the taxes are all based upon this principle of valuation, and a statute of May, 1868, is cited in the brief as enacting that all property of every description within the State shall be entered for taxation at its true money value. If this principle, so clearly embodied in the Constitution as expounded by the Supreme Court, had been made a rule of action by those who have charge of the administration of the laws for assessing taxes, there could be no place for the complaint of plaintiff in this case.

The State, however, by her legislation, has adopted a system of valuation of property into which we must look for a moment to enable us to appreciate the effect of the evidence as to the actual valuation of which plaintiff complains.

Instead of having all property subject to taxation valued by

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one commission or authorized body, there are at least four different bodies acting independently of each other in regard to as many different classes of property in the process of final estimates or values for taxation.

The first of these concerns real estate, which is valued once in each decade, that valuation remaining unchanged during the whole ten years, except that what is called the new constructions of each year is added to the original sum. The assessments of real estate by the district assessors in the county and the ward assessors in the large cities is first submitted to a county or city board of equalization, and this again to a State board of equalization, to be elected once in ten years by the electors of each senatorial district. Of this board the auditor of State is a member. The functions of this final board seem to be to increase or decrease the county valuations of real estate returned to them, according as they are found to be above or below the true money value of the property. But in doing this they only act on a county or city valuation as a whole, and not on the particular pieces of property assessed, and they cannot reduce or increase the entire valuation for the State more than twelve and a half per cent of the aggregate.

Personal property (other than bank shares and railroad property) and the new constructions in real estate, are assessed annually by district and ward assessors in the counties and cities, and their assessment is returned to a county or city board of equalization, and we are not aware that this valuation is subject to any further equalization or submitted to any further correction. This assessment, of course, includes all personal property, money, credits, and investments of capital other than those in banks and railroads. In regard to railroads, there is a submission of all of them to a State board of equalization, which finally passes upon the assessments of the counties. In reference to banks, which are first assessed by the county auditor, there is also a State board of equalization, whose function is limited to equalizing throughout the State the valuation of *the shares of incorporated banks*.

We thus see that one board of equalization has charge of the

valuation of the real estate of the whole State once in every ten years, another has charge of the valuation of railroad property every year, and a third has charge of the valuation of shares of incorporated banks every year, and the amount fixed by these State boards is in every instance the final basis of taxing that species of property for State and county purposes.

We are asked to decide, that as to this final board of equalization of bank shares, whose function is to equalize the valuation of those shares, *as among themselves*, throughout the State, with no power to consider the valuation of real estate which comes before another board only once in ten years, or other personal property and invested capital which never comes before any State board, its operation must necessarily produce inequality in valuation as it regards other property, and is therefore void, as in conflict with the State constitutional rule of uniformity, and with the third section of the same article of the Constitution, declaring "that all property employed in banking shall bear a burden of taxation equal to that imposed on the property of individuals."

But there are two reasons why we cannot so hold. Firstly. It might be that in every instance the result would be the valuation of bank shares at a lower ratio in proportion to its real value than that of any other property, and therefore plaintiff would have no ground of complaint. And secondly, what is more important, if these original valuations and equalizations are based always, as the Constitution requires, on the actual money value of the property assessed, the result, except as it might be affected by honest mistakes of judgment, would necessarily be equality and uniformity, so far as it is attainable. So that while it may be true that this system of submitting the different kinds of property subject to taxation to different boards of assessors and equalizers, with no common superior to secure uniformity of the whole, may give opportunity for maladministration of the law and violation of the principle of uniformity of taxation and equality of burden, that is not the necessary result of these laws, or of any one of them; and a law cannot be held unconstitutional because while its just interpretation is consistent with the Constitution, it is un-

faithfully administered by those who are charged with its execution. Their doings may be unlawful while the statute is valid.

The evidence, we are compelled to say, shows this to be true of the case before us.

It may be summed up in the statement, that the assessors of real property, the assessors of personal property, and the auditor of Lucas county, in which is the city of Toledo, concurred in establishing a rule of valuation by which real and personal property, except money, was assessed one-third of its actual value, and money or invested capital at six-tenths of its value, and that the assessment of the shares of incorporated banks, as returned by the State board of equalization for taxation to the auditor of Lucas county, was fully equal to the selling prices of said shares and to their true value in money. This is shown by the testimony of four or five district assessors, by the auditor of the county for the year 1876, and for several previous years, who had been long an employee in that office. It is also shown by this witness that at one time the auditor of Lucas county held a conference with the auditors of the counties of Fulton, Williams, Defiance, Henry, Paulding, Ottawa, Wood, Sandusky, Seneca, and Van Wirt, and that the rule by which property was valued in Lucas was the result of this conference and was to be applied in all these counties. The district assessors, whose duty it was to make this primary valuation of all personal property (except bank stocks and railroad property), also testify that for the year 1876 they had a meeting and adopted that rule of valuation as their guide, and so applied it. All this is uncontradicted. Nor is there any question that while the auditor probably returned the bank shares of Toledo at six-tenths of their value, or thereabouts, the State board of equalization increased it so that as the cashier of this bank swears, its shares were assessed at their full cash value.

The testimony before us in the case argued with this shows that the same rule of valuation was adopted in Cuyahoga county with the same effect on the shares of the incorporated banks of Cleveland. It probably pervades the system of assessment for the entire State of Ohio, and may have caused the necessity of boards of equalization quite as much as mistakes of judgment or

other sources of inequality which these boards are designed to remedy. But while these separate boards, acting upon returns of different classes of property, and limited in each case to equalizing the value as between the same class in different counties, have no common or united action among themselves and no common power to equalize the valuation of the different classes of property in relation to each other, it is obvious that their capacity to produce the uniformity which the Constitution was intended to effect is very small indeed. They have no power at all to affect the valuation of real estate except once in ten years. They have no power over the valuation of personal property, including all money capital, except bank shares, as it is fixed by the county and city boards; and these being beyond their control, the effort of the State board to raise the assessment of the shares of banks to their value in money only increases the glaring inequality arising from the valuation of the county boards.

It is proper to say, in extenuation of the rule of primary valuation of different species of property developed in this record, that it is not limited to the State of Ohio, or to part of it. The Constitutions and the statutes of nearly all the States have enactments designed to compel uniformity of taxation and assessments at the actual value of all property liable to be taxed. The phrases "salable value," "actual value," "cash value," and others used in the directions to assessing officers, all mean the same thing, and are designed to effect the same purpose. Burroughs on Taxation, p. 227, § 99. But it is a matter of common observation that in the valuation of real estate this rule is habitually disregarded.

And while it may be true that there has not been in other States such concerted action over a large district of country by the primary assessors in fixing the precise rates of departure from actual value, as is shown in this case, it is believed that the valuation of real estate for purposes of taxation rarely exceeds half of its current salable value. If we look for the reason for this common consent to substitute a custom for the positive rule of the statute, it will probably be found in the difficulty of subjecting personal property, and especially invested capital, to the inspec-

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tion of the assessor and the grasp of the collector. The effort of the land-owner, whose property lies open to view, which can be subjected to the lien of a tax not to be escaped by removal, or hiding, to produce something like actual equality of burden by an undervaluation of his land, has led to this result. But whatever may be its cause, when it is recognized as the source of manifest injustice to a large class of property around which the Constitution of the State has thrown the protection of uniformity of taxation and equality of burden, the rule must be held void, and the injustice produced under it must be remedied so far as the judicial power can give remedy. The complainant having paid to defendant, or into the Circuit Court for his use, the tax which was its true share of the public burden, the decree of the Circuit Court enjoining the collection of the remainder is affirmed.

WAITE, C. J., dissenting. I feel compelled to withhold my assent to this judgment. There can be no doubt that the shares of this bank were overvalued as compared with other property in the city, but if a State provides by a valid law for the valuation of property for taxation, and furnishes appropriate tribunals for the correction of errors before a tax is assessed, if complaint is made, I think it is not within the power of a court of equity to enjoin the collection of the tax simply because of an inequality in valuation; and this as well when the error arises from the adoption by the valuing officers of a wrong rule applicable to many cases, as from a mistake in judgment as to a single case. The valuation as finally fixed by the proper officers, or equalizing board, under the law, is, in my opinion, conclusive when there has been no fraud. As it seems to me, this case comes within the operation of this principle.

PELTON V. COMMERCIAL NATIONAL BANK.

(21 Albany Law Journal, 232.)

Taxation.

1. Although the statutes of a State provide for the valuation of all moneyed capital for purposes of taxation, at its true cash value, including shares of the National banks, the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while National bank shares are assessed at their full value, is a violation of the act of Congress which prescribes the rules by which those shares shall be taxed by State authority.
2. In such case, on the payment or tender of the sum which the bank shares ought to pay under the rule established by the act of Congress, a court of equity will enjoin the State authorities from collecting the remainder.

A PPEAL from the Circuit Court of the United States for the Northern District of Ohio. The opinion states the case.

MILLER, J. The bank, which was plaintiff below, was one of those organized under the act of Congress of 1864, creating a National banking system, by virtue of which it can sue in the Circuit Courts of the United States. The suit is a bill in equity to enjoin the treasurer of the county of Cuyahoga in which the city of Cleveland lies, from collecting a tax alleged to be illegal; and the decree of the Circuit Court is in favor of the complainant. The chief ground of objection to the tax set out in the bill, and that which is mainly relied on in argument here, is, that the act of the Ohio legislature, of April 12, 1877, entitled "An act for the equalization of bank shares for taxation," under which the tax complained of was finally assessed, is in conflict with the Constitution of Ohio on the subject of uniformity of taxation, and therefore void.

But there is also a distinct allegation that the tax, as assessed, is in conflict with section 5219 of the Revised Statutes of the United States, because greater than that assessed on other moneyed capital in the hands of individuals, citizens of that State.

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It is an appropriate duty which this court is called upon to perform very often, to protect rights founded on the Constitution, laws, and treaties of the United States, when those rights are invaded by State authority. But it is a very different thing for this court to declare that an act of a State legislature, passed with the usual forms necessary to its validity, is void because that legislature has violated the Constitution of the State.

It has long been recognized in this court that the highest court of the State is the one to which such a question properly belongs, and though the courts of the United States, when exercising a concurrent jurisdiction, must decide it for themselves, if it has not previously been considered by the State court, it would be indelicate to make such a decision in advance of the State courts, unless the case imperatively demanded it. We will therefore inquire first whether the decree of the Circuit Court can be sustained on the other ground.

The bill states very distinctly that the principle on which the valuation of the shares of the bank for taxation is made "destroys the uniformity of the rule fixed by the Constitution, and violates the obligation thereby imposed to treat all property alike, to the end that all property may bear an equal burden of taxation, and is subversive of the act of Congress allowing such shares to be taxed, and intended to protect the owners thereof from greater burdens than were imposed on other moneyed capital at the place where the bank was located." "The necessary effect," it is added, "of the proceedings had in the assessment and levy of the taxes standing against the shareholders of your orator, and now about to be enforced, has been to deprive such shareholders, both in the matter of valuation and equalization, of all benefit of the Constitution and general laws of the State, by which only uniformity in the burden of taxation upon all descriptions of property could be secured, to take from them the security afforded by the limitation in the act of Congress and to impose upon them such excessive exactions as to make the franchises granted by said act comparatively useless." The answer, by way of denial, says that "the taxes mentioned in said complainant's bill, assessed upon the shares of said complainant's banking association, are not taxed at

a greater rate than is imposed by the State of Ohio upon other moneyed capital in the hands of individual citizens of said State resident in the city of Cleveland, where said banking association is established and located."

It is thus very clear that whether the taxation of which the bank complained was a tax on its shares, greater than on other moneyed capital invested in Cleveland, was a question fairly raised by the pleading.

The argument is advanced here which we have just considered in the case of *Williams v. Weaver* (*ante*, p. 57), namely, that if the amount of tax assessed on these bank shares is governed by the same percentage on the valuation as that applied to other moneyed capital, the act of Congress is satisfied, though a principle of valuation is adopted by which inequality and injustice to the owners of bank shares must necessarily result. We do not propose to go over that argument again. The cases have been considered together in conference, because they involved that principle. It is sufficient to say that we are quite satisfied that any system of assessment of taxes which exacts from the owner of the shares of a National bank a larger sum in proportion to the actual value of those shares than it does from other moneyed capital, valued in like manner, does tax the shares at a greater rate within the meaning of the act of Congress.

It is not asserted that any different percentage on the valuation established was applied to these two classes of capital. The bill very clearly shows that the source of the evil was in the unequal valuation.

Taking the answer, with the meaning which the counsel who drew it attaches in argument here to the words, "taxed at a greater rate," it may be said to amount, as a negative pregnant, to an admission that the valuation was unequal, as charged in the bill. Not only so, but it is not denied in argument that while all the personal property in Cleveland, including moneyed capital not invested in banks, was in the assessment valued far below its real worth, say at one-half or less, the shares of the banks, after deducting the real estate taxed to the banks separately, were assessed at their full value or very near it. The only witness who

testified on the subject in this case at all was the auditor of the county of Cuyahoga for the years 1876 and 1877, who had been for many years previously an employee in the auditor's office. He says, that as county auditor he was a member of the board of county equalization, and acted as such member in equalizing the valuation of the shares of the various National and other banks during those years; that the valuation placed on the shares of the National banks was higher in proportion than the valuation on other personal property, including banking capital. He says the matter was talked over in the board, and that it was their aim to make it higher, and that the value placed by them on National bank shares was intentionally higher than the assessed value returned by private banks.

It is necessary here to examine into the mode of assessing the tax as provided in the act of 1877, which related solely to the tax on bank shares. The first section required the cashier of every incorporated bank to make report to the county auditor of the names and residences of its shareholders, the par value of each share, and other facts necessary to enable the auditor to ascertain the value of those shares. The second section required the auditor to assess these shares at their true value in money, after deducting the real estate, and to transmit the assessment with the report of the auditor to the annual board of equalization of the county in which the bank was located. This board was composed, in cities of the class to which Cleveland belonged, of the county auditor and six citizens appointed by the city council. By the third section of that act this board was authorized to hear complaints and to equalize the valuation of the shares of such banks or banking associations, as fixed by said county auditor, and with full authority to equalize said shares according to their true value in money. It is to be remembered that the witness whose testimony we have stated was the county auditor who made the first assessment or valuation of these shares, and was a member of this city board which had authority to equalize that valuation. And it was of this city board he was speaking when he said that they had assessed bank shares generally higher than other personal property, including, of course, other moneyed cap-

ital; and that they had assessed the shares of the National banks higher than private banks, and that it was their aim to do so. It is also important to observe in reference to another view of the question, presently to be considered, that this discrimination was neither an accident nor a mistake, nor a rule applied only to this bank, but that it was a principle deliberately adopted to govern their action in the valuation of all the shares of National banks and applied to them all without exception. It appears by the testimony of this witness that there were seven National banks in the city of Cleveland, whose shares, as equalized by the city board for taxation, amounted to \$3,236,500, to all of which this rule of valuation, making their taxes much higher than on other moneyed capital, was applied, and that this was done for two years at least, and probably many more.

This act of 1877, however, provided another board of equalization, composed of the Auditor of State, Treasurer of State, and Attorney-General, to whom all the assessments of bank shares made by the county and city boards were to be referred, and to whom no other property was referred, for an equalization, which included the whole State. This board could do no more than increase or diminish the valuation of banks for each county and city, so as to make them conform to some standard of equality among themselves which that board might adopt. But the result of their action must be such that it did not increase or diminish the aggregate value of the amount returned by the county auditors of the whole State more than one hundred thousand dollars.

This board, for the taxes now in contest, increased the valuation of the shares of the plaintiff bank \$250,000 above the sum of \$912,000, at which it had been assessed by the county board, and it increased the valuation of the shares of all the National banks of Cleveland from the sum of \$3,236,500 to \$4,046,045.

It is thus seen that the auditor and the city board of equalization valued these shares higher in proportion to other moneyed capital in Cleveland to an extent which the witness does not state, but which may be supposed, to be 30 per cent, as it is shown to

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be in comparison with real estate, and the State board added about one-fourth to that, so that the tax on the National bank shares, against which relief is sought in this suit, is between fifty and sixty per cent on its real value greater than on other moneyed capital, and therefore to that extent forbidden by the act of Congress.

For this injustice and this violation of the law there ought to be some remedy. To the specific one of an injunction by a suit in chancery, and indeed, to any remedy by the bank, many objections are raised, but as all of them have been considered and overruled in the case of *Cummings v. Merchants' National Bank of Toledo* (*ante p. 74*), which was argued at the same time this case was, it is unnecessary to repeat here what was said in that case.

As the complainant has paid so much of the tax as was not in violation of the act of Congress, we think the decree of the Circuit Court enjoining the collection of the remainder was right, and it is accordingly affirmed.

WAITE, C. J., dissenting.

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(22 Albany Law Journal, 189.)

Negotiable instrument — conflict of law.

The courts of the United States, in determining questions of general commercial law, are not controlled by the decisions of a State court, even in an action instituted by a National bank, located in the State rendering such decision, against one of its own citizens, upon a negotiable note there executed and payable. Such decisions, not based upon local legislative enactments, are not "laws" within the meaning of the Federal statute, which provides that "the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply."

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IN error to the Circuit Court of the United States for the Southern District of New York. The case, as made by an agreed statement of facts, is this: The plaintiff in error, the Brooklyn City & Newtown Railroad Company, a corporation organized under the laws of New York, executed, at Brooklyn, in that State, on 9th May, 1873, its promissory note for the sum of \$5,000, payable four months after date to the order of Wm. V. LeCount, (its) treasurer, at the Atlantic State Bank of Brooklyn. It was indorsed in blank, first by LeCount, treasurer, and then by Palmer & Co., a firm composed of Thomas Palmer, Jr., and Anson S. Palmer, the former being the president and the latter the financial agent of the company, and together owning the larger portion of its stock. The note was made for the purpose only of raising money thereon for the company. Neither LeCount nor Palmer & Co. received any consideration for their respective indorsements. The note thus indorsed was, with others, placed by the company in the hands of Hutchinson & Ingersoll, a firm of note-brokers in Wall street, for negotiation and sale.

Prior to the execution of the note Hutchinson & Ingersoll had frequently borrowed money from the defendant in error, the National Bank of the Republic of New York. They however kept no account with that institution, and had no transactions with it other than those to which reference will now be made.

In the month of October, 1872, the bank first made them a call loan, at seven per cent interest, of \$25,000 on collaterals. Subsequently, in 1873, it made to them other call loans on collaterals, at the same rate of interest, as follows: March 11th, \$15,000; March 15th, \$10,000; April 11th, \$10,000; May 16th, \$10,000; May 20th, \$20,000; May 23d, \$10,000; June 4th, \$15,000; June 6th, \$12,000; June 12th, \$10,000; June 19th, \$36,000; and July 11th, \$10,000. Each of these loans was a separate one, upon a particular and distinct lot of collaterals. Hutchinson & Ingersoll were in the habit of borrowing money from various banks and from individuals or firms upon specific lots of collaterals.

The loan of \$36,000 on 19th June, 1873, was upon several notes as collateral security, among them the above-described note for \$5,000, executed May 9, 1873. All the loans by the bank,

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prior to the one of \$36,000, had been paid off before that loan was made.

The loan of \$10,000 on the 11th July, 1873, was upon the following notes as collateral security: Two notes of Howes, Hyatt & Co. for \$2,605.98 and \$3,540.15, and two of H. L. Ritch & Co. for \$3,320.17 and \$2,146.92.

On the 22d July, 1873, Howes, Hyatt & Co. having become insolvent, Hutchinson & Ingersoll executed and delivered to the bank, at its request, antedated to June 19, 1873 (which was the date of the \$36,000 loan), a written instrument whereby they agreed with the bank "that all securities, bonds, stocks, things in action, or other property or evidences of property whatsoever, which have been or may at any time hereafter be deposited or left by us or on our account, with said bank, whether specifically pledged or not, may be held by said bank, and shall be deemed to be and are hereby pledged as security for the payment of any and every indebtedness, liability or engagement on our part, held by said bank, and that on the non-payment, when due and payable, of any sum or sums of money which have been or may hereafter be by said bank lent, paid or advanced to or for the account or use of us, or for which we are or may become in any way liable or indebted to said bank, the said bank, or its president or cashier, may immediately thereupon, or at any time thereafter, sell, etc., * * * and apply the net proceeds of sale to the payment of any sum or sums due and payable from us to said bank, and hold any surplus of such net proceeds, together with any and all remaining securities, property, or evidences of property, then held by said bank and not sold, as security for the payment of any and all other of our then existing and remaining liabilities and engagements to said bank."

When that writing was executed no agreement was made to extend the loan or to refrain from calling it in.

The bank knew that Hutchinson & Ingersoll were note-brokers, but until August 8, 1873, had no knowledge or information of the connection of the Palmers with the railroad company, or of the circumstances attending the making or indorsement of the note in suit, or of the purpose thereof, or of any relations, deal-

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ings or communication between Hutchinson & Ingersoll, and the parties to the note (except that they knew Hutchinson & Ingersoll to be note-brokers), or that the note was any thing else than ordinary business paper, or that there was any question as to the right of said Hutchinson & Ingersoll to pledge or negotiate it. Nor did the railroad company know or suspect that the firm had parted with or hypothecated said note until August 15, 1873.

The company, by reason of certain advances made to its use by Hutchinson & Ingersoll, became indebted to the latter, on the 8th of August, 1873, in the sum of \$600. On the 15th day of August, 1873, it tendered that sum to the firm, and demanded a return of the \$5,000 note. During the same month it made a like tender to the bank, and demanded the note.

The \$36,000 loan was paid in full out of the collaterals given to secure its payment, as they respectively matured, without resorting to the note in suit, the first payment of \$4,580 being July 22, 1873, and the last payment being April 4, 1874, leaving the \$5,000 note in the bank's possession.

Hutchinson & Ingersoll are insolvent. The collaterals collected exceeded the \$36,000 loan by \$4,503.61.

On the \$10,000 loan of July 11, 1873, there was a balance due the bank, November 21, 1876, of \$5,136.68 after exhausting all collaterals in its possession which had been specially pledged to secure that loan, and crediting the amount, with interest collected, of a certain judgment to be now referred to.

In 1874 the bank sued Palmer & Co., as indorsers upon the note in suit, in the Supreme Court of New York. The case was sent to a referee, who rendered judgment in favor of the bank for \$601, which seems to be the amount due from the railroad company to Hutchinson & Ingersoll. That judgment, with the costs, was satisfied.

The present action is by the bank against the railroad company to recover the amount of the \$5,000 note executed by the latter on the 9th of May, 1873, and placed in the hands of Hutchinson & Ingersoll for sale for the benefit of the company.

The court below gave judgment for the bank, to reverse which the company has prosecuted this writ.

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HARLAN, J. [Omitting immaterial questions.] *Third.* It is, however, insisted that by the course of judicial decision in New York, negotiable paper transferred merely as collateral security for an antecedent debt is subject to the equities of prior parties existing at the time of transfer; that the bank being located in New York, and the other parties being citizens of the same State, and the contract having been there made, this court is bound to accept and follow the decision of the State court whether it meets with our approval or not. This contention rests upon the provision of the statute which declares that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

It is undoubtedly true that if we should apply to this case the principles announced in the highest court of the State of New York, a different conclusion would have been reached from that already announced. That learned court has held that the holder of negotiable paper transferred *merely* as collateral security for an antecedent debt, nothing more, is not a holder for value within those rules of commercial law, which protect such paper against the equities of prior parties.

The question here presented is concluded by our former decisions.

We remark, at the outset, that the section of the statute of the United States already quoted is the same as the 34th section of the original Judiciary Act.

In *Swift v. Tyson* (16 Pet. 1), the contention was that this court was obliged to follow the decisions of the State courts in all cases where they apply. But this court said: "In order to maintain the argument it is essential therefore to hold that the word 'laws' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws. They are, at most, only evidence of what the laws are, and not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves, whenever they are found to be

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either defective, or ill-founded, or otherwise incorrect. The laws of a State are more easily understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases which have hitherto come before us for decision this court have uniformly supposed that the true interpretation of the 34th section limited its application to State laws strictly local, that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character. It has ever been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation; as for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves; that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to and will receive the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

In *Carpenter v. Providence Washington Ins. Co.*, 16 Pet. 495, decided at the same term with *Swift v. Tyson*, it was necessary to determine certain questions in the law of insurance. The court

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said: "The questions under our consideration are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of State tribunals may have on such a subject, and they certainly are entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our own opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from those learned State courts, we may regret it, but it cannot be permitted to alter our judgment."

In *Oates v. National Bank*, 100 U. S. 239 (*ante*, p. 35), we had before us the precise question now under consideration. That was an action by a National bank, located in Alabama, against a citizen of that State, upon a promissory note there executed and negotiated. It was contended that the decision of the Supreme Court of Alabama should be accepted as the law governing the rights of parties. We, however, held—referring to some of our previous decisions—that the Federal courts were not bound by the decisions of the State courts "upon questions of general commercial law. * * * We have already seen that the statutes of Alabama placed under the protection of the commercial law, promissory notes payable in money at a certain designated place, but how far the rights of parties here are affected by the rules and doctrines of that law is for the Federal courts to determine upon their own judgment as to what these rules and doctrines are."

To this doctrine, which received the approval of all the members of this court when first announced, we have, as our decisions show, steadily adhered. We perceive no reason for its modification in any degree whatever. We could not infringe upon it in this case without disturbing or endangering that stability which is essential to be maintained in the rules of commercial law. The decisions of the New York court, which we are asked to follow in determining the rights of parties under a contract

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there made, are not in exposition of any legislative enactment of that State. They express the opinion of that court, not as to the rights of parties under any law local to that State, but as to their rights under the general commercial law existing throughout the Union, except where it may have been modified or changed by some local statute. It is a law not peculiar to one State, or dependent upon local authority, but one arising out of the usages of the commercial world. Suppose a State court, in a case before it, should determine what were the laws of war as applicable to that and similar cases. The Federal courts, sitting in that State, possessing, it must be conceded, equal powers with the State court in the determination of such questions, must, upon the theory of counsel for the plaintiff in error, accept the conclusions of the State court as the true interpretation, for that locality, of the laws of war, and as the "law" of the State in the sense of the statute which makes the "laws of the States rules of decision in trials at common law." We apprehend, however, that no one would go thus far in asserting the binding force of State decisions upon the courts of the United States when the latter are required, in the discharge of their judicial functions, to consider questions of general law, arising in suits to which their jurisdiction extends. To so hold would be to defeat one of the objects for which those courts were established, and introduce infinite confusion in their decisions of such questions. Further elaboration would seem to be unnecessary. The judgment is affirmed.

Mr. Justice MILLER dissents.

PEOPLE'S BANK OF BELLEVILLE V. MANUFACTURERS' NATIONAL
BANK OF CHICAGO.*

Guaranty of notes by bank — authority of vice-president.

The vice-president of a National bank, upon making a transfer for value of certain notes belonging to the bank (the bank being the correspondent of the transferee), executed this guaranty: "In accordance with your telegram I

* Not yet reported.

People's Bank of Belleville v. Manufacturers' National Bank of Chicago.

herewith hand you ten notes of \$5,000 each." "We debit your account \$50,000." "This bank hereby guarantees the payment of the principal sum and interest of said notes." This was done in behalf of the bank and the notes were also indorsed by the same individual as vice-president of the bank. It was done with the knowledge and consent of the president and cashier of the bank, but without authority of the directors, as a board, or the majority of its members individually. *Held*, that the bank was liable on the guaranty.

IN error to the Circuit Court of the United States for the Northern District of Illinois. The opinion states the case.

SWAYNE, J. This case was submitted to the court without the intervention of a jury. The court found the facts and gave judgment for the defendant. The plaintiff thereupon sued out this writ of error and brought the case here for review. The act of Congress regulating the procedure adopted seems to have been carefully complied with.

The plaintiff and defendant in the court below are respectively the plaintiff and defendant in error here. For convenience we shall speak of them in this opinion by their former designations.

The facts lie within a narrow compass and there is no controversy about any of them.

On the 8th of August, 1873, Henry C. Pickett made his ten promissory notes of that date, each for \$5,000, all payable to his own order, indorsed by him, all bearing interest at the rate of ten per cent, payable semi-annually, and all payable one year from date. Eight of these notes are described in the plaintiff's declaration. Pickett delivered the notes to the defendant to be negotiated to the plaintiff pursuant to a prior agreement between him and the defendant, that the latter should so negotiate the notes and apply the proceeds to the cancellation of other indebtedness then due from him to the defendant. On the 8th of August, 1873, M. D. Buchanan, vice-president, and one of the directors of the defendant, with the knowledge and consent of the president and cashier of the defendant, who were also directors, but without any authority from the board of directors as a board, or of a majority of them individually, or any notification to the board of directors as a board, transmitted the notes to the plaintiff with a letter, in

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which occurs the following language: "In accordance with your telegram I herewith hand you ten notes of \$5,000 each," etc. * * * "We debit your account \$50,000." * * * "This bank hereby guarantees the payment of the principal sum and interest of said notes." This letter was written below one of defendant's letter-heads and signed "M. D. Buchanan, vice-president." The notes were also indorsed "Henry C. Pickett," and below "M. D. Buchanan, Vice-President Manufacturers' National Bank." The defendant was the plaintiff's correspondent at Chicago, and the plaintiff's account with the defendant was debited with \$50,000 on account of the notes. At the same time Pickett's paper in the defendant's hands was cancelled to the same amount. All the notes were protested at maturity for non-payment, and due notice was given to the defendant. Nothing has been paid on either of the notes. Besides a special count in the declaration upon the guaranty of each of the eight notes involved in this suit, there was a common count for money had and received.

The case was submitted in this court without an oral argument. The opinion of the learned judge who decided the case in the Circuit Court is not in the record, and no brief has been submitted on behalf of the defendant. A few remarks will suffice to give our view of the law touching the rights of the parties.

The National Banking Act (Rev. Stat. U. S. 999, § 5136) gives to every bank created under it the right "to exercise by its board of directors, or duly authorized agents, all such incidental powers as shall be necessary to carry on the business of banking, *by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt*, by receiving deposits," etc. Nothing in the act explains or qualifies the terms italicised. To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named. Undoubtedly a bank might indorse, "waiving demand and notice," and would be bound accordingly. A guaranty is a less onerous and stringent contract than that created by such an indorsement. We see no reason to doubt that, under the circumstances of this case, it was competent for the defendant to give the guaranty here in question.

 Merchants' National Bank of Little Rock v. United States.

It is to be presumed the vice-president had rightfully the power he assumed to exercise, and the defendant is estopped to deny it. Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequences.

The doctrine of *ultra vires* has no application in cases like this. *Merchants' Bank v. State Bank*, 10 Wall. 645, 646.

All the parties engaged in the transaction and the privies were agents of the defendant. If there were any defect of authority on their part, the retention and enjoyment of the proceeds of the transaction by their principal constituted an acquiescence as effectual as would have been the most formal authorization in advance, or the most formal ratification afterward. These facts conclude the defendant from resisting the demand of the plaintiff. Wharton on Agency, § 89; Bigelow on Estoppel, 423; *Railroad Co. v. Howard*, 7 Wall. 392; *Kelsey v. Nat. Bank of Crawford Co.*, 69 Penn. St. 426; s. c., Thomp. N. B. Cas. 847; *McCutchen v. Collins*, 13 Penn. St. 15.

A different result would be a reproach to our jurisprudence.

Whether, if the guaranty were void, the fund received by the defendant as its consideration moving from the plaintiff could be recovered back in this action upon the common count, is a point which we do not find it necessary to consider. See *United States v. State Bank*, 96 U. S. 33.

The judgment of the Circuit Court is reversed, and the case will be remanded, with directions to enter a judgment in favor of the plaintiff in error.

 MERCHANTS' NATIONAL BANK OF LITTLE ROCK V. UNITED STATES.*

Constitutional law — Federal tax on circulating notes of municipalities.

The provision of section 8418 of the National Bank Act that "every National banking association, State bank or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation paid out by them," is constitutional even where its effect is to tax an instrumentality of a State.

* Not yet reported.

IN error to the Circuit Court of the United States for the Eastern District of Arkansas. The opinion states the case.

WAIT, C. J. This suit was brought by the United States to recover the tax imposed by sec. 3413, Rev. Stats., which is as follows: "Every National banking association, State bank or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city, or municipal corporation paid out by them." The only question presented is as to the constitutionality of this statute, the objection being that the tax is virtually laid upon an instrumentality of the State of Arkansas.

We think this case comes directly within the principles settled in *Veazie Bank v. Fenno*, 8 Wall. 539; Thomp. N. B. Cas. 221, where it was distinctly held that the tax imposed on National and State banks for paying out the notes of individuals or State banks used for circulation (Rev. Stats., § 3412) was not unconstitutional. The reason is thus stated by the chief justice: "Having thus in the exercise of undisputed constitutional powers undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. To this end Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile." p. 549.

The tax thus laid is not on the obligation, but on its use in a particular way. As against the United States a State municipality has no right to put its notes in circulation as money. It may execute its obligations, but cannot, against the will of Congress, make them money. The tax is on the notes *paid* out, that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore the banker who helps to keep up the use by paying them out, that is, employing them as the equivalent of money in discharging his obligations, is taxed for

Casey, Receiver of New Orleans Nat. Banking Association, v. Adams.

what he does. The taxation was no doubt intended to destroy the use, but that, as has just been seen, Congress had the power to do.

Judgment affirmed.

CASEY, RECEIVER OF NEW ORLEANS NATIONAL BANKING ASSOCIATION, v. ADAMS.*

Jurisdiction — Local and transitory actions.

The provision of the National Bank Act in relation to suits against National banks, section 5198, that "suits, actions and proceedings against any association under this title, may be had in any Circuit, District or Territorial Court of the United States, held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases," held to apply to transitory actions only, and not to such actions as are by law local in their character.

IN error to the Supreme Court of the State of Louisiana. The opinion states the case.

WATT, C. J. The Federal question in this case is whether a National bank can be sued in a State court in a local action in any other county or city than that where the bank is located. By sec. 5198, Rev. Stats., it is provided that "suits, actions and proceedings against any association under this title [The National Banks] may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." This, we think, relates to transitory actions only, and not to such actions as are by law local in their character. Sec. 5196 subjects the banks to suits at law or in equity as fully as natural persons, and we see nowhere in the banking act any evidence of an intention on the part of Congress to exempt banks from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and tran-

* Not yet reported.

Casey, Receiver of New Orleans Nat. Banking Association. v. Adams.

sitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits in rem, and are to be prosecuted where the thing on which they are founded is situated. To give the act of Congress the construction now contended for would be in effect to declare that a National bank could not be sued at all in a local action where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located. Such a result could never have been contemplated by Congress.

The proceeding in this case was clearly local in its nature. It related to property in the parish of La Fourche, which had been seized and sold under process from the District Court of that parish. The proceeds of the sale were in that court and could not be distributed until "a conflict of privileges" arising between creditors was settled. No personal claim was made against the bank. Nothing was wanted except to "class the privilege" of the bank on the property seized "according to its rank." Whether, under the laws of Louisiana, the form of proceeding instituted for that purpose was appropriate is not a question for us. The decision of the Supreme Court of the State as to that matter is conclusive.

Judgment affirmed.

CASES DECIDED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

FOSS V. FIRST NATIONAL BANK OF DENVER.

(3 Federal Reporter, 185.)

Jurisdiction — cross-bill — interpleaded.

The Federal courts have jurisdiction over all suits by and against National banks, irrespective of the subject-matter. Joining merely nominal or personal parties has no effect either to confer or exclude the jurisdiction; but trustees, executors and the like are not formal parties, within the meaning of the rule, where in fact interested in the litigation. Accordingly, where two or three persons, claiming a certain fund which was in the custody of a National bank, brought their bill in equity against the bank and a third claimant, and the bank exhibited its cross-bill, praying that the parties might interplead, *held*, to confer jurisdiction.

(Circuit Court, District of Colorado.)

IN equity. Bill and cross-bill. Motion to dismiss for want of jurisdiction.

L. C. Rockwell and J. Q. Charles, for motion.

Wagner, Dyer & Emmons and W. S. Decker, opposing.

McCRAEY, C. J. This controversy relates to a fund which, under a written agreement between Simeon H. Foss, Absalom V. Hunter, and Charles R. Bissell, was deposited to their joint credit with the First National Bank of Denver. The money can be drawn from the bank only upon the joint check of the said Foss, Hunter and Bissell, and a dispute having arisen between them as to their respective shares thereof, no joint check has been signed.

On the eighth of January, 1879, defendant Bissell gave notice in writing to the bank that he claimed seven-twelfths of the fund, and that until his claim was adjusted he objected to the payment of any part of the fund to the other claimants. On the sixth of March following the plaintiffs in the original bill, Foss and Hunter served a written notice on the bank, claiming to own nine-twelfths of said fund, and declaring that said Bissell was entitled to three-twelfths only, and they demanded of the bank payment of eight-twelfths of the amount on deposit, leaving in the hands of the bank one-twelfth, as in dispute between them and Bissell. It also appears from an inspection of these notices, that Bissell claims four-twelfths of the fund in his own right, and three-twelfths as agent and attorney for one C. J. Reynolds, and that Foss and Hunter deny all claims on behalf of said Reynolds. The plaintiffs in the original bill, Foss and Hunter, instituted this proceeding in order to settle the controversy as to the proper division of the fund, and pray decree directing payment to them of their alleged share, to wit: eight-twelfths thereof. Defendant Bissell answers, claiming, in his own right and as representing C. J. Reynolds, to be entitled to seven-twelfths. The bank answers, among other things, that it has no interest in the fund, and is only claiming it as a depository, and does not know to which of the claimants it ought of right to render and pay the same. Of the cross-bill filed by the bank I will speak presently. The defendant Bissell moves to dismiss for want of jurisdiction. The motion is urged upon the ground that all the parties are shown by the bill to be citizens of the State of Colorado, and that there is no jurisdiction under the National Bank Act, because the First National Bank of Denver appears, by the record, to be only a nominal party, without interest in the litigation.

Foss v. First National Bank of Denver.

1. It may be regarded as settled that National banks may sue and be sued in the Federal courts by virtue of the provisions of section 629 of the Revised Statutes of the United States, which provides as follows :

“Section 629 — *Jurisdiction.* The Circuit Courts shall have original jurisdiction as follows : * * * * *

‘*Tenth* — Of all suits by or against any banking association established in the district for which the court is held, under any law providing for National banking associations.’” U. S. R. S., § 629 ; *First National Bank of Omaha v. County of Douglass*, 3 Dill. 298 ; Thomp. N. B. Cas. 267 ; *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383-395 ; Thomp. N. B. Cas. 77 ; *Kennedy v. Gibson*, 8 Wall. 498 ; Thomp. N. B. Cas. 17 ; *Osborn v. United States Bank*, 9 Wheat. 738.

Under a similar provision of the charter of the United States Bank of 1816, a question was made as to the power of Congress to confer jurisdiction upon a Federal court in a case not necessarily involving the construction or the validity of a law of the United States, or of some provision of the Constitution or of a treaty. This question was raised upon the second section of the third article of the Constitution, which limits the judicial power of the United States to “cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority,” and it was claimed that a case against a bank of the United States was not necessarily a case arising under a law of the United States. But the Supreme Court, in the case of *Osborn v. United States Bank*, 9 Wheat, 738, in which an elaborate opinion was delivered by Chief Justice MARSHALL, held that the act of Congress conferring jurisdiction upon the Circuit courts in all suits by or against such banks, irrespective of the subject-matter, was constitutional.

This ruling applies with full force to the construction of the above-quoted provision of the Revised Statutes.

2. It seems to be well settled that the joining in a suit of merely nominal or formal parties can have no effect, either in conferring or excluding jurisdiction. *Browne v. Strode*, 5 Or. 303 ; *Wormley v. Wormley*, 8 Wheat. 421 ; *Wood v. Davis*, 18 How.

467. Trustees and executors do not belong to this class. They are, although suing for others, the real prosecutors of the suit. They are parties to the contract. *McNutt v. Bland*, 2 How. 9-10; *Knapp v. Railroad Co.*, 20 Wall. 117. In the latter case, which was a suit by a trustee, the court said: "He is not a mere passive instrument in the litigation. On the contrary, he is active in prosecuting it, and would be remiss in his duty if he failed in using all proper means to bring it to a successful issue. As the cause of action is vested in him, the court looks to his citizenship in determining the question of jurisdiction, and not to the residence of those persons who are beneficially interested in the subject-matter of the litigation." *McNutt v. Bland* was a suit on the official bond of a sheriff executed to the governor of the State. The action was brought in the name of the governor of Mississippi, against a citizen of that State, but for the use of citizens of another State. The jurisdiction was upheld upon the ground that the governor was a nominal party only, the court observing that "in no just view of the Constitution or law can he be considered a litigant party; both look to things, not names; to the action in controversies and suits, and not to the mere forms or inactive instruments used in conducting them, in view of some positive law.

Upon the authority of these and other similar cases I conclude, that where jurisdiction is dependent upon the parties to the suit, we are to look to the real and not to the merely nominal or formal parties. Where suit is brought against a National bank, by virtue of the statute under consideration, it must appear that the bank is a real active party to the litigation in order to maintain the jurisdiction. If the case stood upon the original bill and answer, I should entertain grave doubts as to jurisdiction. It could, in that case be upheld, if at all, only upon the ground that the proceeding, if conducted to a termination, would result in a judgment against the bank.

3. But the bank itself has chosen, by its cross-bill, to invoke the aid and protection of this court as a court of equity, and I will now consider whether it has, in this way, brought the controversy within the jurisdiction.

The Circuit Courts have jurisdiction of suits instituted by National banks in equity as well as at law; and the question to be determined is whether the cross-bill in this case may be regarded as in itself constituting a suit within the meaning of the equity rules and practice prevailing in this court. The cross-bill is filed by the bank against all the claimants of the fund in question, and it sets out the facts already referred to in this opinion. It also avers that plaintiff in the cross-bill is a National bank, organized, and existing under the National Banking Act approved June 3, 1864, and amendatory acts, doing business at Denver, Colorado, within this district. It sets forth the fact of the filing of the original bill in this case, and the substance of the allegations therein, as well as a statement of the conflicting claims and demands upon said fund, of Foss and Hunter on one side and Bissell on the other. Concerning the fund in dispute, the cross-bill sets forth that "the same is now in the bank of your orator, which sum your orator is informed and believes is in dispute between the said Bissell on the one side, and the said Foss and Hunter upon the other; that each party demands the right to own said sum of money last above stated; that your orator claims no right, title, or interest in or to the same, but is merely holding it as a depository or stakeholder, and does not know to which of the claimants he ought of right to render and pay the same. And your orator further represents and shows to the court that it is under no liability to either said Foss and Hunter or said Bissell, beyond that which arises to the title to the money so deposited in its bank. Said Bissell on the one hand, and Foss and Hunter on the other, demand that your orator should pay such money over to them, but they refuse to join in a joint check or order in checking the same out; that your orator has doubts as to which of said parties really owns said money, and that it cannot safely pay or render it to one party without being liable for the same debt to the other," etc.

The prayer is that defendants may be required to interplead, and settle or adjust between themselves, their right or claim in or to the disputed fund, the bank declaring its readiness to pay in accordance with the decree of the court. It is well settled that a

trustee or bailee who is sued, or in danger of being sued, by several claimants of the same property, may have relief by filing a bill to compel them, by the authority of a court of equity, to interplead and settle their dispute in one suit. This rule is based upon the ground that such a proceeding relieves the bailee or depository from being harassed by suits in which he has no interest; and it is especially applicable to a case "where two or more persons severally claim the same thing under different titles, or in separate interests, from another person, who, not claiming any title or interest therein himself, and not knowing to which of the claimants he ought of right to render the debt or duty claimed, or to deliver the property in his custody, is either molested by an action or actions brought against him, or fears that he may suffer injury from conflicting claims of the parties." 2 Story's Eq. Jur., § 806. The proceeding may be instituted, not only to secure for the bailee or depository protection against being compelled to pay or deliver the thing claimed to both claimants, but also to relieve him from the vexation attending upon the suits which are or may be instituted against him. For a full discussion of the whole subject see 2 Story's Eq. Jur., §§ 801 to 813b, inclusive, and cases cited in notes.

The doctrine has been applied to the case of a bank having possession of funds claimed by adversary parties, which is this case. *City Bank of New York v. Skelton*, 2 Blatchf. 14.

4. The remedy in such a case is, as will be seen from an examination of the foregoing authorities, by bill of interpleader, which is an original bill, filed by a person who claims no interest in the subject-matter, in opposition to the person against whom the bill is exhibited, but prays the decree of the court touching the rights of those persons for the safety of the plaintiff in the bill. Story's Eq. Pl., § 18. The remedy is here sought by means of a cross-bill, filed in a case already commenced; but upon examining this pleading I find that it is in substance, and in everything but name, an original bill of interpleader, and I am of the opinion that for the purposes of this motion it may be regarded as an original suit brought by the bank, in the nature of a bill of interpleader, against the several claimants of the fund in controversy. It was filed

Davis v. Essex Baptist Society.

before answering the original bill, and it contains all the substantial allegations of a bill of interpleader, including a prayer for process and for relief. Story's Eq. Pl., ch. 6. In form, the bill, considered as a bill of interpleader, may be slightly defective, but in substance it is sufficient, and in considering the question of jurisdiction we will look to the substance rather than to the form. As the whole controversy is presented by the cross-bill, and can be settled thereunder, I have no hesitation in holding that this court has jurisdiction, and the motion to dismiss is accordingly overruled.

DAVIS V. ESSEX BAPTIST SOCIETY.

(44 Conn. 568.)

Trustee — exemption from personal liability, how to appear — religious society holding stock bought with bequest.

A trustee, holding shares in a National bank, cannot avail himself of his exemption from personal liability for debts of the bank, unless his trusteeship appears on the books of the bank.

With a bequest of money a religious society purchased, and held in its own name, shares in a National bank. The society had other donations otherwise invested. *Held*, that the society was not a trustee, but an ordinary stockholder, and liable to assessment for debts of the insolvent bank.

(District Court, District of Connecticut.)

ACTION by the receiver of a National bank against stockholders to recover the amount of an assessment for the debts of the bank.

The case is stated in the opinion.

T. M. Davis and *W. Howe*, for plaintiff.

L. E. Stanton, for defendants.

SHIPMAN, J. This is an action at law brought by the receiver of the Ocean National Bank of the city of New York, to recover from the defendants an assessment upon their stock in said bank.

The parties agreed by stipulation in writing, waiving a jury, that the case should be tried by the court.

All the allegations of fact which are contained in the plaintiff's declaration were admitted by the defendants to be true and are found to be true. The certificate of stock which was delivered to, and was accepted and is now held by the defendants, is in the name of the First Baptist Church and Society of Essex, individually, and not as trustees. The stock stands, and has always stood, since its purchase by the defendants, upon the stock ledger and the stock books of said bank in the name of the defendants, without indication or notice that they are, or were at the time of the purchase, trustees. The foregoing facts were proved by the plaintiff. It was not claimed that the bank was ever notified that the defendants claimed to be trustees.

The defendants, as matter of defense, offered to prove the following alleged facts, which are set forth in the notice annexed to the plea of the general issue. To the admission of this evidence the plaintiff objected, upon the ground that it was irrelevant and immaterial and constituted no defense against the admitted facts.

The defendants offered to prove that said thirty-six shares of the capital stock in the said Ocean National Bank, described in the plaintiff's declaration to have been owned or held by the defendants as shareholders in said bank, "were purchased and held by the defendants only as trustees, and were never in any manner owned or held by them in their individual capacity, either as a society corporation, or as individuals, but that said shares were in fact purchased wholly with funds which were given by William Williams of Saybrook, Connecticut, deceased, in and by his last will and testament, which was dated December 31, 1834, as follows, to wit: one-nineteenth of his estate to the Second Baptist Church and Society in Saybrook, and their successors forever, in trust to be put to interest with good and sufficient securities, or invested in stocks, the use of which shall be applied annually to defray the expenses of said society; always provided that the salary shall be not at any time less than four hundred dollars the year, including house rent; and another nineteenth of his estate,

less three hundred dollars, given to the same persons and their successors forever in trust to be invested as aforesaid, and the use of which is to be applied from time to time to the cause of missions. The defendants will prove that when said stock was purchased the defendants were and now are the successors of said Second Baptist Church and Society in Saybrook in said trust, and that on or about the 27th day of January, 1867, a committee of the defendants invested in the purchase of said thirty-six shares, the sum of about \$1,900, the same being wholly derived from said bequest of William Williams, and being the whole of the funds derived from said Williams, viz.: two-nineteenths of his estate, less three hundred dollars, and held by the defendants only under said trust."

The defendants further offered to prove "that by the failure of said Ocean National Bank, the defendants, trustees as aforesaid, have wholly lost all of the trust fund received under said will, and have not now in their hands or possession any property or estate, except such as was given and granted to them by other grantors and donors in trust for charitable and pious uses, and none which is liable to be taken to pay the assessment set forth in the plaintiff's declaration."

This evidence was excluded. The defendants duly excepted to the ruling of the court excluding said evidence.

The foregoing constituted all the facts which were proved, and which were offered to be proved, upon the trial.

The evidence was excluded upon the ground that the facts which were offered to be proved constituted no defense against the action.

Section 5150 of the Revised Statutes, the personal liability section of the act authorizing the establishment of National banking associations, is a part of the charter of each National bank. It "pledges the liability or guarantee of the stockholders, to the extent of their stock, to the creditors of the company, and to which pledge or guarantee the stockholders, by subscribing for stock and becoming members of it, have assented." *Harvorthorne v. Calef*, 2 Wall. 22.

A stockholder of record is liable to an assessment although he

has sold his stock, if such transfer has not been made upon the books of the bank. Pledges of stock who hold the legal title and are stockholders of record are liable, although the pledgor may be the actual owner of the stock. So long as stockholders permit themselves to appear upon the record as stockholders, their personal liability continues. The creditors have a right to rely upon the guarantee of those who continue to hold themselves out as stockholders. In ordering an assessment, the stock certificates and the stock ledger are the basis upon which the comptroller of the currency, in the absence of fraud or mistake, must rely. It is impossible for him to ascertain the equities of each stockholder, and if any stockholder could relieve himself from the consequence of his laches by showing that another unknown person was the owner of the stock, creditors might have payment of their debts indefinitely postponed, and an unjust burden might be imposed upon the acknowledged stockholders. Some definite and conclusive means of information as to the ownership of stock for the purposes of assessment ought to be furnished to creditors, to the receiver, and to the comptroller. This information should be found, in the absence of fraud or mistake, in the certificates of stock, and in the stock books of the bank.

But the defendants insist that inasmuch as section 5151 frees from personal liability persons who hold stock as trustees, extrinsic evidence can be resorted to for the purpose of proving the trust, although the certificates and the stock ledger do not disclose trusteeship.

Creditors have a right to know who have pledged their individual liability. If the trusteeship does not appear upon the books of the bank, they have a right to infer that the stockholder is personally liable. If a trustee wishes to disclose his trusteeship, there is no difficulty in giving notice upon the books of the bank. If he does not disclose his trusteeship, he is guilty of laches, for which others should not suffer. The settlement of the affairs of an insolvent bank would be rendered a matter of great labor, expense and delay, if persons who appeared upon the books of the bank as individual stockholders were permitted to relieve themselves by proving that they held the stock as executors, or

guardians, or trustees. If A is permitted to prove that he holds his stock as trustee for B, and B is permitted to show he is trustee for A, litigation would be protracted, individual stockholders would suffer, and the strength of the personal liability section might be seriously impaired. Existence of the trust should appear upon the evidence of ownership. *Adderly v. Storm*, 6 Hill, 628. If it does not appear, and no fraud or mistake is imputed to the bank, the trustee is in fault, and not the bank, nor the creditors. As between two persons otherwise equally innocent, the one who is guilty of laches whereby the other was misled should suffer. *Adderly v. Storm*, 6 Hill, 628; *Stover v. Flach*, 30 N. Y. 64; *Creese v. Babcock*, 10 Metc. 525; *Hals v. Walker*, 31 Iowa, 344.

Again the liability of the stockholder arises from his virtual contract, evidenced by his subscription to the stock, or by his becoming a stockholder. He thereby assents to become security to the creditors for the payment of the debts of the bank. It is not in form a contract, but is an agreement resulting from the assent of the parties to the statutory liability. "It does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory obligation, but is regarded as voluntarily assumed by the act of becoming a stockholder. By such act he consents to be bound, or that his property shall be charged with debts of the corporation, to the extent and in the manner prescribed by the act of incorporation." *Loury v. Inman*, 46 N. Y. 125; *Hawthorne v. Calef*, 2 Wall. 22; *Corning v. McCullough*, 1 Comst. 47. The defendants, by becoming stockholders, and by the acceptance of a certificate which shows that they hold the stock in their own right, have entered into this contract of personal liability. The contract is a completed one, and cannot now be changed against the will of one of the parties into a contract of different character.

Let judgment be entered for the plaintiffs for the sum of \$720, with interest on \$360 thereof from February 26, 1877, and upon \$360 thereof from April 26, 1877, at six per cent

Davis, Receiver, v. Weed.

DAVIS, *Receiver*, v. WEED.

(44 Conn. 539.)

Administrator of shareholder — assessment.

A stockholder in a National bank died intestate, and his estate was settled and distributed. Intermediate his death and the distribution the bank failed, and after the distribution an assessment was made on those who were stockholders at the time of the failure, for the payment of the bank debts. In a suit by the receiver against the administrator, *held*, that the administrator was not a shareholder, at the time of the failure, within the meaning of the National Banking Act, but that the estate was liable.

(Circuit Court, District of Connecticut.)

ACTION by the receiver of a National bank, against the administrator of a stockholder, to recover an assessment for the payment of the debts of the bank. The case is fully stated in the opinion. The plaintiff had judgment below.

T. M. Davis and *W. Howe*, for plaintiff.

H. C. Robinson and *S. Fessenden*, for defendant.

SHIPMAN, J. This is an action at law brought by the receiver of the Ocean National Bank of the city of New York, to recover an assessment which is claimed, under the facts hereinafter stated, to be due from the defendant as administrator *de bonis non* of the estate of Nathaniel Weed. The parties agreed by stipulation in writing, waiving a jury, that the case should be tried by the court. The pleadings subsequently terminated in a demurrer to the special plea of the defendant.

The declaration alleges the organization of the Ocean National Bank of the city of New York, as a National banking association; its failure on December 12, 1871, to pay and redeem its circulating notes; the protest of said notes; the appointment of the plaintiff as receiver by the comptroller of the currency; the plaintiff's acceptance of said office; the ascertainment by the comptroller that the assets of the bank are insufficient to pay its

liabilities, and that it is necessary to enforce the individual liability of the stockholders; the order of the comptroller, dated January 19, 1877, making an assessment of forty per cent of the par value of the shares held by each shareholder, payable in two installments, to wit: \$10 per share on February 26, 1877, and \$10 per share on April 26, 1877, and the order of the comptroller to institute suits for the enforcement of said liability.

The declaration further alleges as follows: About the time of the failure of said bank Nathaniel Weed died intestate, leaving a large real and personal estate; at the time of said failure he was the owner of 514 shares of said bank; on or about September 9, 1872, Harvey A. Weed was duly appointed administrator of said estate; subsequently Harvey A. Weed died, and on or about December 3, 1872, the defendant, Harvey H. Weed, was duly appointed administrator *de bonis non* upon the estate of Nathaniel Weed, who accepted said trust, and is now said administrator; demand was made on March 22, 1877, and on June 12, 1877, for payment of said respective installments, and by reason of the premises the defendant is liable to pay said assessment.

The defendant pleaded specially the following facts: "The said Nathaniel Weed died in January, A. D. 1871, intestate; afterward, on the ninth day of September, A. D. 1872, one Harvey A. Weed was duly appointed and qualified as administrator of his, said Nathaniel's estate; six months from the date of appointment was by the court of probate for the district of said Stamford, which was the domicile of said intestate, limited as the time for creditors to present their claims against said estate; no claim in behalf of this plaintiff was presented by said administrator; all claims theretofore presented against said estate were paid and settled, and said estate was settled and according to law; afterward, said Harvey A. Weed died, on the 3d day of December, A. D. 1872, the defendant was appointed administrator of the estate of said Nathaniel, which had not been already administered; the defendant hath fully administered all and singular the goods, chattels and estate, which were of the said Nathaniel Weed, deceased, at the time of his death, and which have ever come to the hands of the said defendant, administrator, etc., to

be administered, and the said defendant hath not, nor on the day of the plaintiff's writ in this behalf, nor at the time of commencing this suit, nor at any time since, had any goods, chattels or estate which were of said Nathaniel Weed at the time of his death in the hands of said administrator, etc., to be administered; and the defendant has not now, and did not on the day of the demand set up in plaintiff's writ, nor at the commencement of this suit, nor at any time since either of said dates, have in his hands any estate or funds belonging to the estate of said Nathaniel Weed, or which were said Nathaniel Weed's at the time of his death. Said Nathaniel Weed's estate, after the death of said Harvey A. Weed, was treated as the estate of said Harvey A. Weed, and distributed among his heirs at law."

In this state of pleadings the defense is two-fold.

1st. It being admitted that the estate of Nathaniel Weed had been settled according to law, prior to the demand, and that there were no assets in the hands of the administrator at the time of the demand, and that he has fully administered the estate, and that no assets have come to his hands as administrator since the demand, no judgment can be rendered against him.

2d. That inasmuch as the insolvency of the bank occurred after the death of the intestate, when the title of the stock became vested in the administrator, no debt or liability existed at any time against the estate; that the liability, if any, was against the administrator, who by section 5152 of the Revised Statutes is freed from personal liability, and is only liable to the extent of the trust estate and funds in his hands at the time of the demand.

The plaintiff does not claim that a judgment *de bonis propriis* can be rendered against the defendant.

[Omitting the first question.]

II. The defendant next insists, that inasmuch as the intestate died previous to the insolvency of the bank, there was at the time of his death no claim, contingent or otherwise, against his estate; that the title of the stock vested by operation of law in the administrator upon his appointment; that the assessment is against stockholders, and that therefore the liability has accrued against

the administrator who holds the stock as trustee ; that by section 5152 of the Revised Statutes, he is free from personal liability, and that the estate and funds only which are in his hands are liable for payment, and that it is admitted by the pleading that the defendant has no estate or funds in his hands.

The action is based upon the theory that the claim is against the estate of the intestate as an estate in process of settlement, and under the facts in the case the question arises whether a receiver of an insolvent National banking association has a valid claim for an assessment against the estate generally of a deceased stockholder, who died prior to the insolvency of the bank, but whose stock has not been transferred at the date of the comptroller's order. The defendant contends that the receiver never had a claim against the estate of Nathaniel Weed, but that his claim is against existing stockholders, and that the title to the stock vested in the administrator September 9, 1872, and related back to the date of the intestate's death.

It is true that the title to personal property of an intestate vests in Connecticut in his administrator by force of local law and the grant of administration, but I think that the claim of the defendant, although ingenious, is not tenable, for the following reasons :

1. "An executor or administrator has his estate as such in *autre droit* merely, viz. : as the minister or dispenser of the goods of the dead." 1 Williams on Executors, 562.

2. The original liability of the intestate to pay the assessments which may be ordered by the comptroller was a voluntary agreement, evidenced by his subscription or by his becoming a stockholder. It is not imposed by way of forfeiture or penalty. It is imposed by the statute, but it also exists by virtue of the contract which the intestate entered into when he became a stockholder. When the stockholder dies his estate becomes burdened with the same contract or agreement which the dead man had assumed, and so long as it, through the executor or administrator, holds the stock as the property of the estate, and the stock has not been transferred on the books of the bank, and the liability has not been discharged by some act which shows that the new stockholder has taken the place of the old one, the contract liability still ad-

heres to the estate. This liability is not the result of any new contract, for the administrator did not voluntarily become the owner of the stock; it came to him as the dispenser of the goods of the dead, and the liability rested upon the stock, and was a part of the contingent liability of the estate, at least until it was transferred to some other person by a transfer free from fraud. *Corning v. McCullough*, 1 Comst. 47; *Bailey v. Hollister*, 26 N. Y. 112; *Lourij v. Inman*, 46 id. 119; *Hawthorne v. Calef*, 2 Wall. 22; *Gray v. Coffin*, 9 Cush. 192.

3. When an obligation devolves upon an executor solely by virtue of his successorship to the estate, and not by express contract or agreement of his own, the estate is liable. If an executor is liable to pay an obligation resting upon personal property which came to him from the testator, and of which the executor is the owner only as a representative of the estate, and which obligation is due from him solely because he represents the estate, he is liable as executor, even if suit might have been also brought against him personally. *East Hartford v. Pitkin*, 8 Conn. 404, per WILLIAMS, J.

4. I do not think that section 5152 was intended to affect the liability for assessments of estates in process of settlement. The principal object of the section was to prevent a personal liability from running against executors, administrators, trustees or guardians, who had purchased as trustees or to whom had been transferred in their names as trustees National bank stocks for the benefit of the trust estates. Having by such purchase voluntarily entered into a contingent liability for assessments, it might be claimed that a judgment *de bonis propriis* could be rendered against them. The main object of the section was to prevent personal judgments being rendered against such persons in whom the stock stood on the books of the bank as trustees.

I am therefore of opinion that the facts alleged in the plea are not a valid defense to prevent a judgment against the defendant from the estate of the intestate.

As it is not suggested that the defendant has any other ground of defense, the demurrer is sustained, and judgment should be rendered against him as administrator *de bonis non*, solely from

Pettilon v. Noble.

the estate of the intestate, for the sum of \$10,280, with interest on \$5,140 thereof from February 26, 1877, and on \$5,140 thereof from April 26, 1877, at six per cent.

PETTILON V. NOBLE.

(7 Biss. 449.)

Jurisdiction — State court — removal.

A National bank, sued in a State court, cannot enforce the removal of the cause to the Federal court on the ground that the latter has exclusive jurisdiction.*

(Circuit Court, Northern District of Illinois.)

THE opinion states the case.

Omar Bushnell, for complainants.

Gwynn Garnett, for defendants.

BLODGETT, J. This is a suit in equity originally commenced in the Superior Court of Cook county, Illinois, in December, 1873. The complainants had given certain negotiable notes to the firm of W. T. Noble & Co., and secured payment thereof by a chattel mortgage.

The complainants (mortgagors) filed this bill for an injunction to restrain the negotiation of the notes, and the foreclosure of said mortgage, and to have the same declared void, for certain reasons growing out of the dealings between the mortgagors and the mortgagees.

The notes and the mortgage were, as is claimed by the defendants, transferred by indorsements for value before due, to the Central National Bank of Chicago.

The bank was made party defendant. Answers were filed by the defendants, and the case came up on motion to dissolve the injunction. The injunction was dissolved, and the court dismissed

* See *Wilder v. Union Nat. Bk.*, post, p. 124.

the bill without prejudice, and complainants appealed to the Supreme Court of this State.

On the 30th of January, 1875, the Supreme Court reversed the decree of the Superior Court, and remanded the case for further proceedings.

On the 15th of April, 1876, an attorney representing the defendants appeared in the Superior Court, and on his motion in behalf of the defendants, and the presentation of the mandate of the Supreme Court, the case was re-docketed for further proceedings.

On the 14th of October, 1876, the Central National Bank filed its petition for a removal of the cause to this court. Afterward, on November 3, 1876, defendants filed an affidavit in the Superior Court, stating that the attorney, on whose motion the case had been redocketed in April, had no authority to act in their behalf, and asked that the order redocketing the case, as of April 15, 1876, be set aside.

The request was allowed, and the case struck from the docket. The case was then re-docketed, as of November 3, 1876, and then ordered to be removed to this court pursuant to the defendant's petition.

The only ground of removal alleged in the petition is the fact that the defendant, the Central National Bank, is a corporation under the laws of the United States for the organization of National banks, and that it is the chief party to the controversy in the case, and that the controversy can be determined without the other parties to the suit.

Complainants move to remand,

1st. Because the case was not removed to this court in apt time.

2d. Because no sufficient ground for removal is stated in the petition.

[Omitting the first cause.]

The act of March 3, 1875, to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State courts, etc., provides as follows :

"Sec. 2. That any suit of a civil nature at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of

five hundred dollars, and arising under the Constitution of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same States claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, either party may remove said suit into the Circuit Court of the United States for the proper district; and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit in the Circuit Court of the United States for the proper district."

Now, while by the 10th clause of section 629 of the Revised Statutes of the United States, the Circuit Courts of the United States are clothed with jurisdiction "of all suits by or against any banking association established in the district for which such court is held, under any law providing for National banking associations," it will be seen that this court is not invested with exclusive jurisdiction over this class of corporations. Our jurisdiction is only concurrent with that of the State courts.

And the statute in regard to the removal of causes from the State to the Federal courts does not, in terms, give this class of corporations the right to remove a suit. The defendant at whose instance this case is brought here is a resident of this district. The complainants might, under this act of Congress, have sued this defendant in this court, but if the complainants elect another tribunal, can the defendant bring this suit here? The only reason urged why this can be done is, that this defendant derives its corporate existence under a law of the United States, and it is therefore claimed that the case is one "arising under the Constitution or laws of the United States," within the meaning of that clause in the second section of the act of March 3, 1875.

In *Bank of United States v. Devereaux*, 5 Cr. 61, it was held that although the old United States Bank was created by act

of Congress, yet, as it was not specially authorized to sue or be sued in the Federal courts, those courts had no jurisdiction, while in the later case of *Osborn v. United States Bank*, 9 Wheat. 819, it was held that the Federal courts had jurisdiction, because the charter expressly provided therefor; and one of the main questions discussed and passed upon in that case was the constitutionality of this provision, the court in substance holding that as the bank was a creature of Federal legislation, it could give the Federal courts jurisdiction over it. But I do not construe that case as going to the extent contended for by defendant's counsel in this case, that because Congress had created the bank in question, therefore it could sue or be sued in the Federal courts. The reverse of this doctrine was held in the case I first cited, and was not overruled in the latter case.

So, too, the Federal courts are clothed with jurisdiction in all cases where the United States are plaintiffs in a suit at law, or petitioners in a suit of equity, and yet Congress seems to have deemed it necessary to expressly confer upon the United States the right to remove a suit commenced by themselves in a State court to the Federal courts.

Then again, by section 640, Revised Statutes of the United States, it is provided that: "Any suit commenced in any court other than a Circuit or District Court of the United States, against any corporation other than a banking corporation, organized under a law of the United States, or against any member thereof as such member for any alleged liability of such corporation, or of such member as a member thereof, may be removed for trial in the Circuit Court for the district where such suit is pending, upon the petition of such defendant, verified by oath, stating that such defendant has a defense arising under or by virtue of the Constitution, or of any treaty or law of the United States. Such removal, in all other respects, shall be governed by the provisions of the preceding section." Here the right of removal is expressly denied to banking corporations.

In the light of these authorities and the reason of the law, I conclude that this defendant had no right to remove this cause to this court. The motion to remand will therefore be sustained, and the cause is remanded.

WILDER V. UNION NATIONAL BANK.

(12 Chicago Legal News, 84.)

Removal of cause to Federal court.

Banks organized under the acts of Congress, as National banks, are not entitled by force of such act to have any suit or proceeding in the State Court, wherein they are parties defendant, removed to the Federal court.*

To authorize a removal on the ground that the controversy involves a question arising under Constitution of laws of the United States, it must fully appear from all the record that a Federal question is presented. So, where, in a petition for removal to the Federal court, the defendant states that certain laws of the State of Illinois infringe upon or violate the tenth section of article two of the Constitution of the United States, but fails to state in what respect, or how the rights, either of the plaintiff or defendants, are affected by the operation of those laws, the record does not show sufficiently that it is a case coming within the Federal jurisdiction.

If the record presents a Federal question, that a right of action or defense arising under the Constitution and laws of the United States, the citizenship of the parties has nothing to do with it.

(Circuit Court, Northern District of Illinois.)

THE opinion states the case.

BLONDETT, J. A motion is made to remand this case to the Circuit Court of Cook county, from whence it was removed into this court by the defendant. It appears from the record that this is an action in ejectment, which was brought originally by the plaintiff, Jacob Wilder, against the defendants, Libby, McNeil & Libby. Soon after the commencement of the suit, and before pleas were filed, the Union National Bank of this city appeared by petition in the case, and represented to the court that it was the owner in fee of the property in controversy, and that the defendants in the case were tenants of the bank, and prayed that the bank might be made defendant, and allowed to make defense in the case. An order was made to that effect, whereupon said bank filed its plea of the general issue, and at the same time its petition for the removal of the case to this court, which petition

* See *Pettit v. Noble*, ante, p. 120.

was granted, and an order of court entered directing such removal. The plaintiff now moves to remand the case to the Circuit Court of Cook county.

It appears from an inspection of the record, that the removal was claimed in the petition filed by the bank upon two grounds. First, that the defendant bank is a corporation, organized and doing business in this district, under the act of Congress, "for the organization and government of National banks," and that as the corporation derives its existence from a law of the United States, it is claimed that this is a controversy arising under a law of the United States within the meaning of the second section of the act of March 3, 1875, fixing the jurisdiction of the Federal courts, and the right of removal from the State to the Federal courts. Secondly, that said suit is one arising under the Constitution of the United States in this: "that the question is involved in said suit of whether the obligation of the contract of purchase of the premises, of which those in question form a part by your petitioner's predecessor in the title of Benjamin Wilder, the plaintiff's ancestor, under whom he claims, is not impaired under section 10 of article 2, of the Constitution of the United States, by certain acts of the General Assembly of the State of Illinois, to wit: an act entitled 'An act authorizing cities to change, alter and vacate streets, or parts of streets,' approved February 15, 1851, and an act entitled 'An act in relation to the vacation of streets, squares, lanes, alleys and highways,' approved February 16, 1865, and an act entitled 'An act to revise the law in relation to the vacation of streets and alleys,' approved March 24, 1874."

The motion to remand is made upon the ground that sufficient evidence does not appear upon the face of the record to show that this case is removable from the State to the Federal court.

The first cause for removal assigned, which is, that being a National bank, the defendant has the right of removal, is not, I think, well taken. By the second section of the act of July 27, 1868, section 640, of the Revised Statutes of 1874, it is provided that "any suit commenced in any court other than the Circuit or District Court of the United States against any corporation other than a banking corporation organized under the law of the United

States, or against any member thereof, as such member, for any alleged liability of such corporation, or such member as a member thereof, may be removed, etc." It is now, I think, the well-settled law by decisions by justices of the Supreme Court, and circuit judges at their circuits, although there is no decision to that effect, to my knowledge, by the Supreme Court, that this statute remains in force except so far as it is repugnant to, and thereby constructively repealed by the act of March 3, 1875; and if so, corporations, like this defendant, are expressly excepted from the right of removal.

As to the second cause upon which the right of removal is claimed, that this is a suit arising under the Constitution and law of the United States; that is, that the subject-matter of the controversy is a question necessarily arising under the Constitution and laws of the United States, it will be noticed that not until the act of March 3, 1875, did Congress ever authorize the removal of a case from the State to the Federal court, because it was a case arising under the Constitution and laws of the United States; and I am not aware that the direct question has ever been made in any of the Federal courts as to what must be shown in the record in order to authorize the Federal courts to take jurisdiction of a case removed to them from the State court for this cause. It would seem, however, to be a safe and sound rule to adopt, that it must clearly appear from the record, when all inspected together, that a Federal question is presented, and must necessarily be passed upon in the disposition of the case. Tested by this rule, an inspection of the pleadings in this record fails to disclose any Federal question; we have a simple declaration in the usual form in ejectment, in which the plaintiff charges the defendants with having entered the premises in question, and with holding possession thereof from the plaintiff, and the plaintiff's averment that he claims the premises in fee, and the defendant's denial by the plea of general issue of the allegations in the plaintiff's declaration. From the nature of the pleadings in this form of action, very little is disclosed in regard to the nature of the controversy, on the peculiar questions which will arise on the trial of the case.

The defendant, in making a case for removal by its petition,

has attempted to set out how a Federal question does arise under the Constitution of the United States, in the case. I have no doubt that it was the right of the plaintiff to inform the State court in this manner of the Federal question which it intended to insist upon in the case. The only question is, is it sufficiently set out, so that the court can clearly see that such a question does, and must necessarily, arise on the trial of the suit? It seems to me that the statement is far too meagre to give the requisite information.

The defendant states that certain laws of the State of Illinois infringe upon, or violate the tenth section of article 2 of the Constitution of the United States, but fails to state in what respect, or how the rights, either of the plaintiff or defendant in the suit, are affected by the operation of those laws. There is perhaps, enough in the statement of the case, by reference to the statutes of the State of Illinois there referred to, to lead the court to infer that the controversy is in regard to the vacation of a street or alley by some city or town authority, but it seems to me this is not sufficient. The party should state, with sufficient particularity, the facts through, from which the question arises, that the statutes of Illinois, when applied to such facts, violate the constitutional right referred to; and there being no such statement, it seems to me that the record does not show sufficiently that this is a case coming within the jurisdiction of this court, or the right of removal from the State to this court.

It was also objected by plaintiff, on the motion to remand, that part of the defendants are citizens of the same State with plaintiff, and therefore the right to remove did not exist. Two answers to this objection occur to me: 1st. If the record presents a Federal question, that is a right of action or defense under the Constitution and laws of the United States, then the citizenship of the parties has nothing to do with the right to remove.

2d. The bank, as owner of the fee to the property in controversy, has assumed the conduct of the litigation, and its tenants, Libby, McNeal & Libby, are only nominal parties; in fact were in default for want of plea, although no default had been formally entered against them at the time this petition for removal was filed.

The cause is remanded to the State court.

UNITED STATES v. COOK COUNTY NATIONAL BANK.

(25 Internal Revenue Record, 206.)

Priority of United States claims — repeal by implication.

The United States Government has a priority over other creditors on the proceeds of the sale of bonds deposited as security for the circulation of National bank bills, as well as a prior claim in the distribution of the bank assets, for the payment of claims of the Government against such bank, and may apply the proceeds of such assets to the payment *pro tanto* of its claim for postal funds and money order funds deposited in such bank by the postmaster.

Repeals by implication are not favored by the courts, and in the absence of express words of repeal, it is the duty of the court to give effect to a prior statute, if it can be done, unless the repugnancy between the two is so absolute and palpable as to be recognized at once.

(Circuit Court, Northern District of Illinois.)

THIS cause was heard before the Circuit justice, the Circuit judge, and the District judge, upon demurrer to the bill, which disclosed the following facts:

The defendant, the Cook County National Bank, was duly organized under the National Banking Law, and was also designated as a depository of money and funds of the United States. It became insolvent, and suspended business on 19th of January, 1875. Its liabilities largely exceeded its assets. On 1st of February, 1875, the defendant, Burley, was appointed its receiver, and immediately thereafter entered upon the discharge of his duties. At the time of suspension, the bank had on deposit postal funds to the amount of \$24,900, and money order funds to the amount of \$14,684. These deposits had been made by John McArthur, postmaster at Chicago, under the direction of the Postmaster-General, and were designated respectively on the books of the bank as "postal funds," and "money order funds" of the United States. At the date of the suspension, the Secretary of the Treasury held \$150,000, par value, of the U. S. bonds as security for all public moneys deposited in said bank. These bonds were subsequently sold by him, and the proceeds applied

United States v. Cook County National Bank.

to the payment of \$155,305.47 on deposit in the bank, to the credit of the U. S. Treasurer, leaving of such proceeds the sum of \$19,239.05, which, by direction of the Secretary of the Treasury, was applied, by the proper officers of the Post Department, to the payment of the sums due the United States for postal and money order funds; that is, \$11,803.98 on the amount due for postal funds, and \$7,435.07 on the amount due for money order funds, leaving still unpaid the sum of \$13,096.02 of postal funds, and \$7,248.93 of money order funds.

When the bank suspended, the Treasury Department held U. S. bonds to the amount of \$100,000, deposited by the bank as security for its circulation. The bank having failed to pay its circulation, these bonds, in pursuance of the statute, were declared forfeited to the United States. A portion of them had, when the bill was filed, been sold, and it was the intention of the department to sell the remainder for the purpose of redeeming the circulating notes, and reimbursing the Government for advances made on that account, which would leave a balance exceeding \$30,000, or a sum sufficient to pay the debts due the United States on account of postal and money order funds deposited as aforesaid, in the bank, by McArthur. In addition, the Treasury Department held a sum exceeding \$30,000, belonging to the bank and which had been collected, upon bills receivable, and debts due the bank, in the course of settling up its affairs.

A question arose whether the claims of the United States for moneys deposited by Postmaster McArthur was a preferred debt; that is, whether the United States should not distribute the funds and assets in its hands, equally among all the creditors of the bank, including the United States. Thereupon, this bill was filed for the purpose of having an account taken of the amount due the Government, and for a decree directing the disposition of the funds belonging to the bank in the control of the Treasury Department.

On behalf of the bank and its receiver the contention was, that after reimbursing the United States for all sums advanced in redeeming the bank's notes, in excess of the proceeds arising from the sale of United States bonds deposited with the depart-

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ment, as security for its circulation, the entire assets of the bank should be distributed *pro rata*, or equally among all the creditors of the bank, including the United States.

HARLAN, J. Very early in the history of the Government it was provided by statute, that debts due the United States should be first satisfied in all cases where any revenue officer or other person, thereafter becoming indebted to the Government, by bond or otherwise, should become insolvent, or where the estate of any deceased person, in the hands of executors or administrators, should be insufficient to pay all the debts due from the deceased. The priority thus established was declared to extend not only to cases in which an act of legal bankruptcy should be committed, but to cases in which a debtor not having sufficient property to pay all his debts should make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor should be attached by process of law. Act of March 3, 1797, 1 Stat. 515. That was an act providing more effectually for the settlement of accounts between the United States and receivers of public money, but it was held to include all debtors to the United States, whatever their character and by whatever mode bound. *United States v. Fisher*, 2 Cr. 358; *Beaston v. Farmers' Bank of Delaware*, 12 Pet. 102. In the act of March 2, 1799, regulating the collection of duties on imports, a like priority was given to the Government as to the claims upon bonds given for the payment of duties. 1 Stat. 676; Act of 1790, 1 Stat. 169. The policy inaugurated by these statutes seems to have been steadily maintained by the Government. Their substantial provisions have been preserved in the authorized revision of the statutes. R. S., § 3467 *et seq.*

It is insisted, however, by the defendants, that a different rule must be observed in the distribution of the assets of an insolvent National bank, in charge of a receiver, appointed by the Comptroller of the company. They assume that the National Bank Act of 1864, the provision of which are preserved in the Revised Statutes, placed all the creditors of a suspended National bank upon an equal footing, except that for any deficiency in the pro-

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ceeds of the sale of U. S. bonds pledged to secure the circulation of such bank, but for no other purpose, the Government is given "a first and paramount lien upon all the assets of such association," and to that extent and no farther, it is entitled, in the distribution of assets, to priority above all other creditors. 13 Stat. 114.

This position, it is earnestly claimed, is sustained by section 50 of the act of 1864 (R. S., § 5236), which, among other things, provides: "And from time to time, the Controller, after full provision shall have been first made for refunding the United States any such deficiency in redeeming the notes of such association as is mentioned in this act, shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction; and from time to time as the proceeds of the assets of such associations shall be paid over to him, he shall make further dividends, as aforesaid, on all claims previously approved or adjudicated, and the remainder of such proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock respectively held."

The specific contention is, that these provisions of the National Bank Acts operate as a repeal or modification, *pro tanto*, of the statutes which give the Government a priority in the distribution of the estates of those indebted to it.

We cannot yield our assent to any such construction of the statutes in question. The authorities cited by learned counsel do not, as we perceive, justify the conclusion for which they contend. They only announce the general rule, recognized in all the books, "that a subsequent statute which is clearly repugnant to a prior one necessarily repeals the former, although it does not do so in terms; and even if a subsequent statute be not repugnant in all its provisions to a prior one, yet if the latter statute was clearly intended to prescribe the only rule that should govern in the case provided for, it repeals the former act *leges posteriores contrarias abrogant*." *Davies v. Fairburn*, 3 How. 636; *Wood v. United States*, 16 Pet. 362; Sedg. Stat. Const. 124, 125.

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But it is equally well settled that repeals by implication are not favored by the courts. It must be presumed that the subsequent statute was passed with accurate knowledge of the language and scope of previous legislation upon the same subject. If there was an intention to repeal or modify the prior statute, the further presumption must be indulged, that direct terms, for that purpose, would have been employed. In the absence of express words of repeal, it is the duty of the court to give effect to the prior statute, if it be possible to do so, and, unless the repugnancy between the subsequent and prior statute is so absolute and palpable as to be recognized at once, without the aid of ingenious argument, it should be assumed that the legislative department intended both statutes to stand. 1 Black, 471; Sedg. Stat. Const. 127.

In view of these established rules of statutory construction, we are unable to concur in the suggestion that the National Banking Acts were intended to effect the priority given by previous statutes, to the United States in the distribution of the estates of insolvent or deceased persons, or of corporations, indebted to the Government. We include corporations because it is the settled construction of the original act of 1797, that corporations are included in the general designation of "persons" in the statute. 12 Pet. 101; 6 id. 29. It is admitted by learned counsel that before the passage of the act of 1864, the Government had a priority in all the cases specified in the acts of 1797 and 1799, whether the debtors were individuals or corporations. It is also admitted that such priority now exists, except in the cases of National banks for whom receivers have been appointed.

But no sound reason has been assigned for a distinction in behalf of the general creditors of National banks, which, counsel concede, is not allowed in behalf of the creditors of other corporations, by whatever authority created, and which are indebted to the United States. The words of the statute are broad, that "whenever *any* person indebted to the United States is insolvent * * * the debts due to the United States shall be first satisfied." The defendant bank is therefore embraced by the express language of the statute. The same considerations of

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public policy which suggested the act of 1797 exist now as well as when the act of 1864 was passed, and there is no such irreconcilable inconsistency between the two acts, or between the several provisions of the Revised Statutes upon the same subject, as requires us to assume that Congress intended, by the last statute, to surrender the Government's priority in any case covered by the prior statute. The two acts may well exist together. The direction in the National Bank Act, as to a ratable dividend upon all claims against the bank, satisfactorily proven, or adjudicated in a court of competent jurisdiction, should be construed as applicable to all cases of suspended National banks, in the hands of receivers, except, and except only, where the United States is a creditor of the bank, and in such cases, the rule of priority, declared in express words, and never directly or by necessary implication abrogated by Congress, should be enforced. They, the prior and subsequent statutes, may thus be reconciled. We are unwilling, by mere judicial construction, to upset a long-established policy of the Government in reference to its claims against insolvent debtors, whether individuals or corporations.

Our attention has been called to the case of *National Bank v. Colby*, 21 Wall. 613; Thomp. N. B. Cas. 109, where the Supreme Court of the United States, referring to the act of 1864, said: "As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank." That case, it is clear, does not touch the precise point under consideration. It did not involve any question of priority as between the United States and the general creditors of the bank. The contest in that case was between the receiver, representing the general creditors, and a particular creditor, who had sought, through adversary proceedings by attachment in a State court, to obtain a preference or advantage over other creditors. It was in reference to such a contest that the language cited was used.

The court is of opinion that the grounds assigned in support of the demurrer are not well taken — that the application by the United States of the balance on its hands, arising from the sale of bonds held as security for all public moneys deposited in the

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defendant's bank, to the payment, *pro tanto*, of its claims for postal funds and money order funds, was in accordance with law, and that it may retain out of any money under its control, belonging to the bank, a sum sufficient to discharge any lawful debt or claim it has against such bank, however it may have originated.

The demurrer is overruled, and unless the defendants present an answer, controverting the allegations of the bill, complainants' counsel may prepare such order as may be consistent with this opinion.

All concur.

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(14 Banker's Magazine, 723.)

Officer of National bank—power to bind bank away from banking-house.

Although the duties of the president of a National bank are generally transacted at its place of business, yet the bank will be bound by his acts within the apparent scope of his authority, although performed away from the place where the bank is situated, and even in another State, when the bank is informed of them and does not object, and there is no fraud.

(Circuit Court, Northern District of Illinois.)

THE opinion states the case.

DEUMMOND, J. At the time that the transactions took place which are the subject of controversy in this case, the City National Bank of Chicago was the correspondent of the First National Bank of La Crosse, and a large amount of business was done between the two banks amounting often to the sum of \$100,000 per month. Generally the Chicago bank had a large balance in its hands to the credit of the La Crosse bank; and it was the custom of the Chicago bank to transmit, regularly, copies of the accounts between the two banks, showing the debits and credits, and these accounts were in all cases acknowledged by the La

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Crosse bank ; and if there was any error or mistake it was pointed out. During the time this business was transacted, the La Crosse bank was in the habit of drawing checks and directing payment out of the funds in the hands of the Chicago bank ; and every thing concerning the matters in controversy in the case was done substantially in the same way as in other business matters between the banks ; and not only was no objection made to the disputed charges but they were admitted by the La Crosse bank, and every thing that was done between the two banks was on the basis that the disputed charges were at the time acknowledged by the La Crosse bank.

Sutor was formerly connected with the City National Bank of Chicago. He went to La Crosse and became the cashier of the First National Bank of that place, and remained in that position some time ; and the result was that he obtained the control of that bank and subsequently became president. There may have been some circumstances which enabled the president of the City National Bank, who held that position up to January, 1874, to know that Mr. Sutor was not a man of very large means, and that he would not have resources enough of his own to obtain the control of that bank ; but admitting that to be so, the question is, whether there were facts known to authorize the officers of the bank here to conclude that at the time these various transactions took place, which are the subject of controversy, there was a fraud practiced upon the bank of La Crosse by Mr. Sutor. Fraud is not to be presumed. It must be proved. It is sufficient, of course, if it is proved by circumstances which are sometimes the most satisfactory evidence to establish fraud.

Mr. Sutor owed the bank here for a loan that had been made. He had executed his note for the amount (\$7,000), and when he became president of the bank at La Crosse he gave instructions to the bank here to charge the sum of \$2,000 to the La Crosse bank, and it was done ; and he stated at the same time he gave these instructions, that the balance of the amount which he personally owed, which, I take it for granted, referred to the note for \$7,000 which he had given, would soon be paid ; and accordingly instructions were subsequently given to charge to the La Crosse bank the \$5,000 which was still due upon the note, and it

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was so charged. Besides this, which constitutes the main controversy in the case, it seems that a transaction took place between Mr. Sutor and Mr. Miner, the cashier of the City Bank, by which the former purchased of the latter some real estate in Chicago or its vicinity, upon which Mr. Miner owed a balance evidenced by note, and this note Mr. Sutor had agreed to pay. That accordingly was taken up, when it became due, by Mr. Sutor in the same way, namely, by instructions to charge the amount to the La Crosse National Bank. If that were all in these transactions, it might be contended with some plausibility on the part of the plaintiff that it was not liable for the charges that were made by the City National Bank. But that is not all; accounts were made out from time to time and transmitted to the La Crosse National Bank, in which were included the charges which are the subject of controversy, and made against the La Crosse bank by the City National Bank, and entered as a payment *pro tanto*, on the amount due from the Chicago bank to the La Crosse bank, for deposits made by the latter from time to time. The receipt of these accounts was acknowledged by the La Crosse bank as they were forwarded, and it was then stated that the accounts conformed to the books of the La Crosse bank, although it turned out that in fact they did not so conform, which fact, however, was unknown to the Chicago bank. One of the notes it seems was transmitted to Mr. Sutor — the note which he was to pay for Miner. There is no evidence what became of the other note, but the facts prove the existence of the note given by Sutor to the bank here, and its payment in the way stated, viz.: in consequence of instructions from the president of the La Crosse bank.

In relation to the checks given in Chicago, by Mr. Sutor, as president of the bank, it is true that the general business of an officer of a National bank is to be transacted at its regular place of business. At the same time we know that in the course of business between banks officers of banks occasionally do give orders and instructions away from the place of business of the bank. And if they are within the general scope and authority conferred upon the officers, they may be binding upon the bank. But all accounts of this kind were included in those transmitted

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to the La Crosse National Bank. What security can there be in the business relations between banks if accounts of this kind are not considered conclusive and binding upon the respective banks, unless, indeed, there is a mistake, or it can be shown that there has been a fraud practiced upon the bank, against which the charges are made, and that fraud known to the other bank or its officers? Unless that can be done, there would be no safety in the transactions of banks with each other. One bank would never know what to do on instructions given, or a charge made. Here is an "individual" account which one bank has against a particular person. Another bank with which it is transacting business, and with which it has an account, instructs that bank to charge this individual indebtedness to it. The charge is made and the account rendered showing it is done, and the bank which makes the charge knows nothing of any wrong being done, or of any mistake, or of any fraud being practiced by the officers of the bank. That being so, it must foreclose the bank or else banks must cease doing business with each other. And it ought to be so. Where a bank, established under an act of Congress, or in any other way, elects its own officers, the men who are interested in the bank, the stockholders, the depositors, ought be bound by the authorized acts of the officers, or those which appear to be authorized, whether they are or not, and by the general mercantile usage of banks. So that in any view that I can take of this case, it seems to me that the plaintiff cannot maintain its action; that it must be concluded by the course of the business which has been done. *Non constat*, but that admitting all that is claimed on the part of the plaintiff, Mr. Sutor may have presumptively made some arrangement justifying his action with his own bank. The natural presumption that would arise in the minds of the officers of the city bank was that Mr. Sutor had made some transactions with the La Crosse bank, by which he was authorized to act, and by which the La Crosse bank had assumed the individual debt which Sutor owed to the City National Bank. If the defendant insists the court must certify to the balance due from the La Crosse bank to the city bank, because I hold that these items of accounts which are the subject of contro-

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versy constitute a valid charge against the La Crosse National Bank.

This is a controversy between the creditors of two insolvent banks, and I think the loss occasioned by the wrong of the officers of the La Crosse bank should fall on the creditors of that bank, rather than on those of the Chicago bank.

WRIGHT V. FIRST NATIONAL BANK OF GREENSBURG.

(18 Albany Law Journal, 115.)

Right to sue National bank for usurious interest assignable in bankruptcy.

The right of a borrower to sue a National bank for double the amount of usury taken is a claim or debt which will pass to his assignee in bankruptcy, and such assignee can maintain an action thereon.

(Circuit Court, District of Indiana.)

ACTION to recover the penalty for taking usurious interest, brought by Arthur L. Wright and Henry H. Woollery, assignees of Francis J. Randolph, Frank Wright and Ebenezer Nutting, bankrupts, against the First National Bank of Greensburg. The opinion states the case.

Coffroth & Stuart, Baker, Hord & Hendricks, Dye & Harris,
for plaintiffs.

McDonald & Butler, for defendant.

GRESHAM, J. The declaration alleges that the defendant has reserved, taken and received usurious interest from the bankrupts. The action is brought to recover double the amount of interest thus paid, and is based upon the 30th section of the Banking Act, U. S. Stat. at Large, which reads as follows :

“Every association organized under this act may take, receive, reserve and charge on any loan * * * interest, at the rate allowed by the laws of the State or Territory where the bank is located, and no more ; except that where by the laws of any State a different rate is limited for banks of issue, organized under any State laws, the rate so limited shall be allowed every associa-

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tion organized in any such State under this act. And when no rate is fixed by the laws of the State or Territory the bank may take, receive, reserve or charge a rate not exceeding seven per cent. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest paid from the association taking or receiving the same."

The defendant demurs to the declaration on the ground that the plaintiffs, as assignees in bankruptcy, have no legal capacity to prosecute the action. This is the only question presented by the demurrer.

The right of action given by this section is penal. *Tiffany v. National Bank, etc.*, 18 Wall. 409; Thomp. N. B. Cas. 90.

In the absence of a statute authorizing it, a right to a penalty cannot be assigned, nor a right of action for a tort. *Gardiner v. Adams*, 12 Wend. 297. The defendant exacted and received usurious interest. Had the bankrupts remained solvent they might have prosecuted an action for double the amount of interest paid. Unless the right of action has been barred it yet exists, either in the bankrupts or their assignees. It is insisted that because the bankrupts could not have sold or transferred the right of action, if they had remained solvent, therefore, their assignees have no legal capacity to prosecute the suit. *Tiffany v. National Bank, supra*, was an action by a trustee to recover the penalty given by the statute. The plaintiff recovered, but his capacity to maintain the action seems not to have been directly raised. In the case of *Crocker, assignee, v. First National Bank, etc.*, 4 Dill. 358; Thomp. N. B. Cas. 317, the precise question raised by this demurrer was considered, and it was held by DILLON, J., that the assignee was the "legal representative" of the borrower within the meaning of the Banking Act, and as such could maintain the suit whether the right of action vested in the assignee under the Bankrupt Law or not.

In *Tiffany v. Boatman's Association*, 18 Wall. 375, the assignee in bankruptcy was allowed to recover usurious interest which had been paid by the bankrupt in violation of the statutes of Missouri.

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In *Meech v. Stoner*, 19 N. Y. 26, it was held that an assignee could maintain an action to recover money lost at faro, under a statute which gave the right of action to the loser. See, also, *Carter v. Abbott*, 1 B. & C. 444, and *Gray v. Bennett*, 3 Metc. 522. In this last case the assignee of the insolvent debtor was allowed to recover three-fold the amount of usurious interest paid to the defendant, that being the amount allowed by the Massachusetts statutes. This is a well-considered case.

In *Bromley, assignee, v. Smith*, 2 Biss. 511, it was held by MILLER, District Judge, that the assignee could not maintain an action to recover the penalty given by the statute. And it seems to be conceded that in the case of *Barnett v. Muncie National Bank*, in the Circuit Court of the United States for the Southern District of Ohio, a similar ruling was made by Justice SWAYNE, and the late Circuit Judge, EMMONS, in an oral but unreported opinion. (See same case, *ante*, p. 18.) To the same effect is *Nichols v. Bellows*, 22 Vt. 581.

The Bankrupt Act (Rev. Stats., §§ 5044, 5045, 5046 and 5047) vests in the assignee for the creditors the entire estate of the debtor — every thing of beneficial interest passes by the deed of assignment, except certain necessary exemptions which are intended to protect the bankrupt and his family from temporary distress.

It is true that rights of action for torts to the debtor's person, such as assault and battery, false imprisonment, malicious prosecution, libel and slander, do not pass to the assignee. While it must be conceded that under the decision of the Supreme Court this is an action, in part at least, to recover a penalty, yet there are reasons why claims of this kind should vest in the assignee which do not apply to the rights of action for damages growing out of mere torts to the debtor's person. In the right of action given by the Banking Act the bank exacts and receives from the borrower more than the law allows as a fair compensation for the use of its money. In this illegal way the bank gets into its possession part of the borrower's estate, money which should go to the creditors of the bankrupt borrower. This demand and receipt of illegal interest by the bank may have materially con-

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tributed to the bankrupt's downfall. The recovery allowed by the 30th section of the act is "in an action of debt."

If the assignees are not the "legal representatives" of the bankrupt within the meaning of the 30th section of the Banking Act, and the right of action never passed to them under the Bankrupt Act, then, unless the suit has been barred, the bankrupts may sue for and recover the money for their own benefit, when, perhaps, they have already received their full exemptions and have been discharged from all their obligations.

As between the bankrupts and their creditors this would be unjust, and such a result is not easily reconciled with the chief object of the Bankrupt Law, which is the equal distribution of the insolvent debtor's entire estate amongst all his creditors.

In *Grey v. Bennett, supra*, "it is very clear," say the court, "that if a creditor of the insolvent debtor should attempt to prove a note under the commission, it would be the duty of the assignee to reduce the amount, if usurious interest had been taken on it, or was reserved in it, and in this manner the creditors would be benefited by such reduction. Why should they not have the advantage of it where the debtor was paid the usurious demand prior to the insolvency and within the time limited by the statute for recovering it?"

I think the assignees are the "legal representatives" of the bankrupts within the meaning of the 30th section of the Banking Act; and that the right of action given by said section is a "claim" or "debt" which passed to the assignees under the sections of the Banking Law already cited.

Demurrer overruled.

ST. LOUIS NATIONAL BANK V. BRINKMAN.

(1 Federal Reporter, 45.)

Jurisdiction.

National banks are not authorized to institute suits in the Federal courts out of the districts where they are established, when the amount in controversy does not exceed \$500.

(Circuit Court, District of Kansas.)

THE opinion states the case.

Sterry & Sedgwick, for plaintiff.

Gardiner Lathrop, for defendant.

FOSTER, J. The plaintiff is a National bank, duly organized under the act of Congress of June 3, 1864 (13 U. S. Stat. 99), and is established and doing business at the city of St. Louis, State of Missouri. It brings this action against the defendant, who is a citizen of the State of Kansas, to recover the sum of \$138.51, with interest from August 10, 1878, at 10 per cent per annum, for so much money collected by defendant for the use and benefit of plaintiff.

The defendant maintains that the plaintiff, being a National bank established out of this judicial district, this court has no jurisdiction.

The question is one upon which I have found no adjudicated case, and we have to look to the several acts of Congress to determine the point at issue.

Involving, as it does, the right of National banks to sue in the Federal courts out of the district in which they are established, the question presented is an interesting one. The amount in controversy in this case being less than \$500, that alone would defeat the jurisdiction, unless there is some law authorizing National banks to sue in the Federal courts out of the district where they are established, and without regard to the sum in controversy.

Section 59 of the act of 1863, commonly known as the "Currency Act" (12 U. S. Stat. 681), reads as follows:

"That suits, actions and proceedings, by and against any association under this act, may be had in any Circuit, District or Territorial court of the United States, *held within the district in which such association may be established.*"

The act of June 3, 1864 (13 U. S. Stat. 116, § 57), re-enacts this section, omitting the words "by and," so it in terms only authorized proceedings in said courts against such associations and not by them. But the Supreme Court, in *Kennedy v. Gibson*, 8

Wall. 506, held that the omission of those words was accidental and not intentional, so the law remained in that respect as it was originally enacted. When the revision of the United States Statutes was had, this section was dropped from the Currency Act, title, "National Banks," and was placed under the title "Judiciary," and there reads as follows :

"The Circuit Courts shall have original jurisdiction as follows :

* * * * *

. "Tenth. Of all suits by or against any banking association, *established in the district for which the court is held*, under any law providing for National banking associations." U. S. Rev. Stat. 110, 111.

It will be seen that this provision is in substance the same as that contained in the Currency Acts before mentioned, and very clearly limits the jurisdiction to suits by or against *banking associations established in the district where the court is held*, and that jurisdiction in no way depends upon the amount in controversy.

There is but one other provision of the law touching this question, and that is found in the Rev. Stats. (2 Edm.) 993, under the title "National Banks," and among the enumerated powers conferred on these banks is the following: "To sue and be sued, complain and defend, in *any* court of law and equity *as fully as natural persons*." This provision is copied *verbatim* from the Currency Acts of 1863 and 1864.

There is nothing in this enactment conferring any special jurisdiction on the Federal courts in cases where National banks are parties ; but these banks are placed on an equal footing with natural persons in all courts of law and equity.

Now in the case of natural persons the citizenship of the parties and the amount in controversy in actions of this nature are both material, and are the controlling elements to jurisdiction in this court.

I need not decide or discuss the question whether a National bank organized under the law of Congress and established in the State of Missouri is a citizen of that State under the rule recognizing corporations organized under the laws of a State as citizens

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of that State, for the purpose of suing and being sued in the Federal courts. Even if the affirmative of that proposition could be maintained, there would still be a want of jurisdiction in this case, as the amount in controversy is not sufficient, and on that ground this case must be dismissed, and the costs paid by defendant refunded to him.

MOORE V. JONES.

(3 Woods, 58.)

Pledges of stock — liability of, for bank's engagements.

One who procures a transfer to himself, on the books of a National bank, of stock in such bank, becomes liable for the engagements of the bank as prescribed in the National Bank Act, although such stock was pledged to him by the owner, simply as security for a debt.*

(Circuit Court, District of Louisiana.)

BILL to enjoin a receiver from prosecuting a suit at law, and for a decree to correct a transfer of stock, and declare the plaintiffs not liable as shareholders. The bill alleged that the defendant Jones, as security for his debt, delivered to the plaintiffs certificates of National bank stock, owned by Jones, and that the plaintiffs, in ignorance of their legal rights, had the stock transferred to themselves on the bank books, erroneously supposing that step necessary to the validity of the pledge; and that the bank subsequently failing, the defendant Case, receiver of the bank, had commenced an action at law against them to enforce their individual liability as shareholders for the debts of the bank. A demurrer was interposed.

John Finney and Henry C. Miller, for complaint.

John D. Rouse, for receiver.

WOODS, J. The demurrer is well taken. The Currency Act

*See Thomp. N. B. Cas. 471, to same effect.

(Revised Statutes, § 5139) declares that "the capital stock of each association shall be divided into shares of one hundred dollars each and be deemed personal property, and shall be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of said shares."

Now, according to the averments of the bill, Moore & Janney, became the transferees of the stock of Jones by transfer on the books of the association. According to the terms of the act, such transfer made them stockholders and subjected them to all the rights and liabilities of the prior holder of the shares, among which is that shareholders shall be held individually responsible equally and ratably, and not one for another, for all contracts and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares.

So far as the bank and public were concerned, Moore & Janney were the owners of the stock. They were entitled to vote the stock at stockholders' meetings, to draw dividends, and to transfer the stock to whom they pleased. The public were advised by the list of stockholders kept in the office where the business of the bank was transacted (see Rev. Stat., § 5210), that Moore & Janney were shareholders to the amount of sixty-five shares. By appearing on the stock-book of the bank and upon the list of shareholders required to be posted in the business room of the bank, they assumed the liability of shareholders. Neither the bank nor the public were required to take notice of the private understanding between Moore & Janney and the person from whose name the stock had been transferred. The individual liability falls upon the person who appears on the stock-book of the bank by transfer to him to be the owner of the stock. The law organizing the banks seems to place it there. To allow one, who, by inspection of the stock-book, appears to be a shareholder, who has allowed himself to be held out by the bank to the public as a shareholder, to set up secret arrangements between himself and the real owner as a de-

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fense to his individual liability for the debts of the bank, would be to make of no avail the individual liability clause of the Currency Act.

"It is well settled that one to whom stock has been transferred in pledge or as a collateral security for money loaned, and who appears on the register of the corporation as the owner of the stock is, in the event of the insolvency of the corporation, chargeable as a stockholder for the benefit of creditors." Thompson on Stockholders, § 223; *Adderly v. Storm*, 6 Hill, 624; *Rosevelt v. Brown*, 11 N. Y. 148; *Matter of Empire City Bank*, 18 id. 199, 223; *Holyoke Bank v. Burnham*, 11 Cush. 183; *Magruder v. Colston*, 44 Md. 349; s. c., Thomp. N. B. Cas. 554; *Crease v. Babcock*, 10 Metc. 525, 545; *Wheelock v. Kost*, 77 Ill. 296; s. c., Thomp. N. B. Cas. 408; *Pullman v. Upton*, 96 U. S. 328.

Moore & Janney, so far as the bank and public were concerned, were to all intents and purposes shareholders and individually liable as such. The demurrer to the bill must be sustained.

BOWDELL V. FARMERS AND MERCHANTS' NATIONAL BANK OF BALTIMORE.

(14 Bankers' Magazine, 387.)

Shareholder — individual liability — collateral security — surrender of certificate.

One in whose name shares of the stock of a National bank stand on the bank-books is subject to the individual liability of a shareholder, although his holding of the stock was originally as collateral security for a loan, and the loan has been repaid, and the stock certificate surrendered with an executed power of attorney for transfer.

(Circuit Court, District of Maryland.)

THE opinion states the case.

GILES, J. In this case a jury trial was waived, and it was tried before the court in pursuance of the provisions of section 649 of the *Revised Statutes of the United States*. The facts exposed before the court are as follows: "First National Bank of Nor-

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folk was a bank duly authorized under the National Bank Acts 1863 and 1864. That by the stock ledger of said bank a certain Burwell held twenty shares of the capital stock of the said bank, of the par value of one hundred dollars each; that he subsequently borrowed money of the defendant in this suit, and to secure the payment of the same, transferred to the defendant his twenty shares of the capital stock of the said First National Bank of Norfolk, which transfer was made on the books of said bank by a surrender of his certificate and a new certificate issued to the said defendant. That said defendant when said loan was paid returned said certificate of stock to said Burwell with a power of attorney indorsed on the back of the same, authorizing him to re-transfer the said twenty shares to himself, but this was never done, but the said stock continued to stand in the name of this defendant up to the time of the closing of the said First National Bank of Norfolk, without any thing on the face of the books of said bank to show that this defendant held the said twenty shares only as security for a loan and not as the legal owner of the same. That subsequently, to wit, on June 3, 1874, the Comptroller of the Currency, in pursuance of the power and authority vested in him by the said acts of Congress, closed the said bank and appointed the plaintiff receiver of the same, and on the 13th of August, 1875, the said Comptroller determined that in order to discharge the legal debts and liabilities of the said bank it was necessary to enforce the individual liability of the stockholders, as provided for by the 12th section of the act of Congress of the 3d of June, 1864, and he directed the said plaintiff as receiver to institute such legal proceedings as might be necessary to enforce against the stockholders of said banks their liabilities under said acts. In pursuance of which direction and authority this suit was brought. The counsel for the defendant has contended that it is not responsible, upon two grounds. First, because it held the said twenty shares of the capital stock of the said Norfolk bank only as a security for a loan made to its real owner, and secondly, because before the closing of the said bank the loan had been paid to defendant, and it had delivered to the borrower the certificate of the said power of attorney on the back thereof

to re-transfer it to him. The court does not consider either of these reasons sufficient to prevent a recovery of the amount claimed in this suit. By the 12th section of the act of 1874, it is provided "that every one becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and by the said section it is also provided that the shares shall be transferred on the books of the bank. Now, it was the duty of the defendant, having taken an assignment on the books of the said bank of these twenty shares, when its loan was repaid to it, to have seen that these shares were transferred back to the said Burwell, on the said books, and having failed to do so before the bank was closed by the Comptroller, the receiver was authorized to regard it as the legal owner of these shares. I therefore give judgment in the case for the sum of two thousand dollars with the costs of this suit.

UNITED STATES V. CONANT.

(9 Central Law Journal, 129.)

Embezzlement.

The word "embezzle," as found in the United States Revised Statutes, is used to describe a crime which a person has an opportunity to commit by reason of some office or employment, and which may include some breach of confidence or trust.*

Section 1025 of the Revised Statutes provides: "No indictment * * shall be deemed insufficient * * * in a matter of form only." *Held*, that any thing that forms a part of the description of the crime is not a "matter of form."

(Circuit Court, District of Massachusetts.)

MOTION to quash indictment.

LOWELL, J. These indictments are drawn under section 5209 of the Revised Statutes: "Every president, director, cashier, teller, clerk or agent of any association" (that is, National bank-

ing associations, which are mentioned in this chapter), "who embezzles, abstracts, or willfully misapplies any of the moneys, funds or credits of the association, or who, without authority from the directors, issues or puts in circulation any of the notes of the association, or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree; or who makes any false entry in any book, report or statement of the association, with intent in either case to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and any person who, with like intent, aids or abets any officer, clerk or agent, in any violation of this section, shall be deemed guilty of a misdemeanor."

The principal points that have been taken appear to be objections to the mode in which the indictments charge this crime. That may be subdivided, and there are two principal objections:

One is that the facts to show an embezzlement, as distinct from some other crime — for instance, larceny — are not sufficiently set out in the indictment, and has been very fully and ably argued from what may be called the foundation. The leading idea of the argument is that the word "embezzle," by its own force, describes something which was known to the common law, and now by statute, like the words "murder" and "steal;" and that the sense in which the word "embezzle" is already well known in our laws must give the interpretation to the word in this statute.

That is a very important point, and I have given it such attention and consideration as I might. I have come to the conclusion that there was no common-law definition of embezzlement when our Constitution was formed. There was a very ancient statute, which was in force in some of the States and not in others — that of Henry VIII — at least it has been decided not to be in others, though I should have supposed it was in all; but I must take the decisions, of course. But if there was any such statute, which by reason of having been passed as early as Henry VIII was in force here, it does not define the word "embezzlement" in this statute.

There was no common-law definition of it, there never has been, and there is not now. Some elements of the crime are probably common to the statutes, and also to the familiar meaning of the word; that is to say, that the word appears to mean, whenever used to distinguish a crime which a person has the opportunity to commit, by reason of some office or employment which may include, in its signification, some breach of confidence or trust, some misuse of an opportunity of that sort. That is about all, I think, that can be found of a general nature in the meaning of the word. I do think, however, that there is one mode of comparison — one source of comparison — and that is by the various statutes which make up the body of the Revised Statutes — all passed on a certain day of 1874, and all forming one body of law.

Examining the word "embezzle," as used in these various statutes, which are all contained in this very large volume now, I think it will be found that the only general idea which runs through the whole use of the word "embezzle," generally, is the one that I have stated.

The crew of any merchant vessel may commit the crime of embezzlement in regard to the cargo or stores of the vessel. That cargo and those stores are not in their possession, and not intrusted to them in any technical sense. They are not in law in the possession of a seaman. He has an opportunity, being a member of the crew, to steal them. Undoubtedly it would be larceny at common law, but it would be embezzlement by the statute, if he took them fraudulently to convert to his own or some improper use.

Any person who receives public money from any agent of the United States — some agents being designated by a particular name, and also a general word being used — without authority, not being a duly authorized depository, commits the crime of embezzlement in receiving that money. He becomes a sort of agent, and cannot say he was not an agent, and is guilty of embezzlement, for the statute says: "Every banker, broker or other person not an authorized depository of public moneys, who knowingly receives from any disbursing officer * * * any public

money on deposit, or by way of loan, * * * is guilty of an act of embezzlement."

There are many other statutes. The word, as used in the post-office laws, applies only to agents, clerks, etc., of the United States. But if I remember rightly — I have not looked at all the statutes, but I have a very strong impression, for I have tried a good many of the cases — it does not depend upon the letter being intrusted to the particular officer or clerk or agent, under the circumstances which would constitute embezzlement under many of the statutes. Any officer of the mint or assay office may embezzle coins, medals or moneys in his charge, or of which he assumes charge, or any other moneys, medals or coins in his office.

It is very apparent, I think, from an examination of these various statutes, which were re-enacted on the same day, and which before that time formed a body of law enacted at various times, that the word is not used generally in the statutes. I do not know that it is at all in the United States in so sharp and technical a sense as it has been construed to be under some statutes, and of course the definition of the crime must be followed by the courts. There is no definition of it here or in any of the statutes of the United States, but the word is used in such a way as to show the meaning which I have mentioned, and therefore I think, though I do not find it necessary to decide, that it will not be found, when the point comes to be decided, that in those cases those rules that have been laid down in some courts — and the courts have differed as the statutes have — those sharp lines would be found to be drawn about the word "embezzle" in the statutes of the United States. But I do think — and this is a point of law, not pleading — I do think that the intent here governs the whole fraud. It is not a perfectly clear point. In the only case that is cited on either side, the pleader averred that the acts had been done with intent, as I gather from the report. There are several counts. In one, for instance, an embezzlement with intent was charged. In the next, abstracting with intent. In the next, willful misapplying with intent. It was conceded, therefore, in that case by the prosecuting attorney representing the Govern-

ment, that the intent governed the whole cause. The court carefully say that they do not decide that point, evidently seeing ambiguity and doubt which had not been argued to them, and therefore, perhaps, having quite as much weight as if it had been argued, as showing how a person reading the statute would say there was a doubt on this point. But when taken with the original statute, in which there are no semi-colons, and if it is taken with the remainder of the section — "Every person who with like intent aids or abets any officer, clerk or agent in any violation of this section" — I think the better opinion is — and of course we must decide the doubtful points as well as the clear ones — that that governs the whole section. There are reasons for it, also, as was said by the counsel in argument. A person may willfully misapply money without doing any wrong in fact, and without intent of any. For instance, he may pay Mr. "A." instead of Mr. "B.," both being honest creditors. It is a misapplication, and it might injure or not the employer.

"Abstracts;" that is rather a tender word. That might possibly be held to be committed without willful intent, and even without actual injury. That is a matter that is a good deal discussed in the case of the *United States v. Taintor*, assuming that the intent is necessary. The meaning and importance of the intent is a good deal discussed on the supposition that it is a part of the statute.

The word "embezzlement" of itself would hardly seem to require any such qualification, because I think that would carry in any sense — I mean in any sense in which it could be used — would carry with it some intent. But when we look back to one of the statutes I have cited, it will be seen that the mere receiving of public money is embezzlement. There is embezzlement without intent, and without injury in fact. So, that as to the meaning of the word "embezzle" — taking, as I do take, the meaning of that word from the statutes of the United States themselves, it might be necessary (in the opinion of Congress, I mean, for I have nothing to do with that) to say that that crime could not be committed without the positive intent to "injure" or "deceive," or "defraud," for all three words are used, and at any

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rate as to the two words "abstract" and "misapply," there is an obvious reason for it.

I think I can see why the semi-colons were put in, and that is to meet another argument made that the words "such authority" govern the whole sentence. It is very clear they do not. This section is carefully parted off by the semi-colons, and by the sense also. "Every president, director, cashier, teller, clerk or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association;" "or who, without authority from the directors, issues or puts in circulation any of the notes of the association;" and that must be done with intent to defraud, or injure or deceive; and then, repeating the words "without such authority," and it is repeated because they meant to repeat it.

"Or who *without such authority* issues, or puts forth any certificate of deposit, draws any order or bill of exchange, mortgage, judgment or decree;"

Now, in the next clause of the sentence they omit the words "without authority," so that it is perfectly clear, I think, from the statute, that whenever they meant to say "without authority," they do say so, and when they do not say so they do not mean so to do. They put these words in twice, and leave them out of all the others, and they part off the sentence carefully with semi-colons so as to show to what portions of it these words are intended to refer, and that is the reason why the semi-colons were put in.

I have consulted Judge NELSON about it, and he agrees with me. That being so, I think that the only counts which are sufficient, are those for making false entries. To be sure, the statute says, sec. 1035, "No indictment * * shall be deemed insufficient * * in matter of form only."

That "*only*" is important. It must be a "matter of form," and in construing that in this Circuit we have been very liberal. I have no sympathy with the extreme technicality of the ancient criminal law — do not like it, and do not believe in it. At the same time, I have to administer it as I find it, and any thing which forms a part of the description of the crime does not seem

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to me to be a matter of form. In this particular case it might turn out to be a matter of very little importance. Undoubtedly the intent might often be presumed from the fact; but when Congress sees fit to make the intent part of the crime, I do not think the courts have any right to say it is a mere matter of form. So far as "misapplying" and "abstracting" are concerned, that is a very important part of the substance. I do not think that this statute means that we should find out what is an important point of the substance, but only an important point of form. I do not mean to say that the matter of substance may not be very loosely stated, and if the substance of the offense is loosely stated — badly stated — imperfectly and ungrammatically stated, still, if the meaning is clear, that is a matter of form; but it is not a matter of form to state the substance of the crime.

Indictment quashed.

BAILEY, Receiver, v. SAWYER.

(4 DILL 463.)

Assessment on stockholders — determination of Comptroller — mode of enforcement.

The determination of the Comptroller as to the necessity of an assessment on stockholders of an insolvent National bank, for the payment of debts, is conclusive, and such assessment may be enforced by separate actions at law.*

(Circuit Court, District of Minnesota.)

ACTION at law to enforce the individual liability of a stockholder in the First National Bank of Duluth, and to recover the amount of an assessment ordered by the Comptroller of the Currency, under and by virtue of the National Bank Act. The complaint was demurred to, because it did not set forth the facts and data upon which the Comptroller determined that a necessity existed which authorized proceedings to enforce the individual

* To same effect, *Stanton, Receiver, v. Wilkeson*, post, and *Strong, Receiver, v. Southworth*, post.

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liability of stockholders, and because the suit should have been in equity, and not at law.

W. W. Billson, for demurrer.

Ensign and Cash, contra.

NELSON, J. The Comptroller of the Currency, by virtue of the National Banking Law, in winding up an insolvent bank, is vested with authority to determine when a deficiency of assets exists, so that the individual liability of the stockholders may be enforced. This liability is conditional, and was so held in *Bank v. Kennedy*, 17 Wall. 22; Thomp. N. B. Cas. 87, but the Comptroller, in the exercise of a judicial discretion, decides, upon the data before him, when "it is necessary" to compel contributions from stockholders to pay the debts of the bank. The law clothes him with this authority, and no appeal lies from his decision by a stockholder. He appoints a receiver, and resorts to the ultimate remedy whenever in his judgment the condition of the bank requires its enforcement. And as stated in *Kennedy v. Gibson*, 8 Wall. 504; Thomp. N. B. Cas. 17, a more speedy settlement of the affairs of an insolvent bank is thus obtained. Again, this obligation of the stockholder is fixed when he becomes a member of the corporation by taking stock therein, and is several, not joint. There is no necessity for invoking the aid of a court of chancery to determine the sum each stockholder must pay, for that is regulated by the number of shares of stock owned. When the Comptroller declares and orders an assessment, the precise amount each stockholder must contribute is a certain exact sum. A suit at law would seem to be the suitable proceeding to collect the assessment.

Demurrer overruled.

MEYERS V. VALLEY NATIONAL BANK.

(18 National Bankruptcy Register, 84.)

Action against bank for refusal to transfer stock on which it claims a lien — purchase by bank of its own stock — remedy to set aside in bankruptcy.

(District Court, Eastern District of Missouri.)

An assignee in bankruptcy cannot maintain an action against a National bank for the value of shares of its stock belonging to the bankrupt, and which the bank, claiming a lien on them for a debt due to it from the bankrupt, refused to transfer to the assignee.

A National bank purchased some of its own stock and divided it among some of its directors. One of the directors took some of the stock, giving his note for it, the bank retaining the certificate, but the stock being transferred to him on the bank books, and he receiving dividends on it. This director becoming bankrupt, he transferred the stock to the bank teller, the bank retaining his note. In an action by the assignee to set aside the transfer as a preference, *held*, that the bank had no power to purchase or convey the stock, and no title to it passed.

THE defendant claimed a lien under its by-laws, on ten shares of its stock owned by Peter Behr, of the firm of Goodwin, Behr & Co., for a debt due to it from that firm. Behr becoming bankrupt, his assignee, Meyer, claimed that the by-law was void under the National Banking Act, and demanded from the bank a certificate of the stock in his own name as assignee, which being refused, he sued to recover its value. The bank had bought up some of the stock in the market, and divided it among its directors. Behr, who was one of the directors, took 25 shares, giving his note for it to the bank, which the bank discounted, retaining the certificate, but transferring the stock on the books, and paying the dividends to him. The note was several times renewed, and was never paid. When he became bankrupt he transferred the stock to the teller of the bank to secure the bank, and the bank retained the note as an asset. The plaintiff claimed this to be a preference.

TREAT, J. At the trial of this case the first impression was that the defendant must be held estopped from disputing that

Behr was the owner of the shares mentioned in the second cause of action. Further reflection upon an examination of the National Bank Act (sections 5201 and 5210, with the cognate sections in the Revised Statutes) has induced a different conclusion. The bank was prohibited from becoming the purchaser or holder of the shares in dispute. How, then, could it acquire any title thereto which it could transfer to Behr? The irregular and unlawful contrivance adopted cannot change the legal results. The bank had lawfully no stock to convey, and though Behr may have appeared on the stock ledger as the owner of these shares, and the bank have paid him a cash dividend thereon, still he was not the lawful owner. A list of the stockholders, as required by section 5210, and the report thereof to the Comptroller of the Currency, is necessary for the protection of all interests, especially with reference to the double liability. Hence, as to the second cause of action, the finding is for the defendant. As to the first cause of action — conversion of the ten shares — the parties consent to a judgment for the value thereof, five hundred and fifty dollars. But the court is here met by the legal difficulty that the bank cannot purchase or hold these shares. As judgment for conversion vests the title to the converted property in the wrong-doer, and the wrong-doer in this case cannot hold the title, how can the court give a judgment which will contravene the law? To carry out the agreement between the parties as to the said ten shares they should consent to an amendment to the petition, so that damages may be had for failure to transfer as demanded by plaintiff. The court can then assess nominal damages and costs, with the understanding that the transfer will be at once made to the plaintiff.

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DAVIS, Receiver, v. STEVENS.

(20 Albany Law Journal, 490.)

Stockholders' liability.

S. bought shares in a National bank and caused them to be transferred to E., who was in his employ, S. remaining the real owner. *Held*, that S. was liable as stockholder upon the failure of the bank.

(Circuit Court, Southern District of New York.)

ACTION by Theodore M. Davis, receiver of the Ocean National Bank of the city of New York, against Calvin A. Stevens, executor of Calvin Stevens, deceased, to enforce the liability of defendant's testator as stockholder in the bank named. The opinion states the facts.

WAITE, C. J. This was a suit at law by the receiver of an insolvent National bank to enforce the individual liability of an alleged stockholder under section 5151 of the Revised Statutes. The bank failed December 12, 1871, and it is conceded that Calvin Stevens, the decedent, did not then appear on the books as a shareholder, and had not appeared as such since October 29, 1870. On that day one hundred and seventeen shares stood in his name, which he caused to be transferred to one Elston, an irresponsible person, and a porter in the office of his New York broker. At the time of the transfer, so far as appears from the evidence, there was no suspicion of the insolvency of the bank, and it remained in good credit for more than a year afterward. Subsequently Stevens made other purchases of the stock of the bank, and sometimes made sales. His purchases were put to the credit of Elston on the stock books, and to meet his sales, he, acting as the agent of Elston under a power of attorney for that purpose, caused the necessary transfers to be made from the same account. On the 22d of November, 1871, there stood to the credit of Elston on the books one hundred and sixty-one shares, for which a formal certificate was issued in his name, and delivered to Stevens as his agent. It did not appear from the testimony that any of the

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shares which once stood in Stevens' name were included in this certificate. The account on the books remained unchanged from that time until the failure.

Upon this state of facts the court below directed a verdict in favor of the defendant, and the single question now presented is, whether that was right. For all the purposes of this inquiry it must be assumed that as between Stevens and Elston, Stevens was the real owner of the stock. Clearly the evidence tended to prove that fact, and there was enough to make it wrong to take the question from the jury. There is no pretense that Elston did not give his assent to the transfer to him on the books. This made him liable as a shareholder. *Upton v. Tribilcock*, 91 U. S. 45; *Webster v. Upton*, id. 65; *Pullman v. Upton*, 96 id. 328. The point to be decided now is whether, in an action at law by a receiver of the bank, the real owner of stock in a National bank standing by his procurement in the name of another, and never having been in his own name on the books, can be charged as a shareholder with the statutory liability for debts.

The Banking Act (13 Stat. 99, § 1; Rev. Stat., § 5134) provides that the certificate of organization shall specify among other things, "the names and places of residence of the shareholders, and the number of shares held by each of them. Section 12 of the original act is as follows: "That the capital stock of any association formed under the act shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association, in such manner as may be prescribed in the by-laws or articles of association; and every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies or securities of the existing creditors of the association shall be impaired. The shareholders of each association formed under the provisions of this act, * * * shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein at the par value thereof, in addition to the

amount invested in such shares. * * * In the Revised Statutes these provisions are separated and reproduced as sections 5139 and 5151, but for the purposes of construction they are to be considered together. Rev. Stats., § 5600. Section 63 of the original act (Rev. Stat., § 5152) provides "that persons holding stock as executors, administrators, guardians and trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust funds would be, if they were respectively living and competent to act and hold the stock in their own names." Section 40 (Rev. Stats., § 5210) requires that a full and correct list of the names and residences of all the shareholders shall be at all times kept in the office where the business of the association is transacted, subject to the inspection of shareholders and creditors, and that a verified copy of this list must be transmitted to the Comptroller of the Currency.

Under these provisions of the law it is contended that the registered shareholders alone can be charged with the statutory liability, and that an assignee of stock does not make himself responsible unless he accepts an actual transfer in his own name on the books. As has just been seen, the registered holder is liable. By holding himself out to the world as owner, as he does when he permits his name to appear to that effect on the books kept for the information of shareholders and creditors, he estops himself from denying that he is in fact what he represented himself to be. The question still remains, however, whether the person for whom the registered owner holds the stock, if actually the owner, may not also be liable.

The Supreme Court, at its last term, held in *Germania Bank v. Case*, 99 U. S., that if a registered owner transferred his stock in a failing corporation to an irresponsible person for the mere purpose of escaping liability, or if his transfer was colorable only, the transaction was void as against creditors. At the same term in *Case v. Marchand*, 99 U. S., an effort was made to charge Marchand with liability as the real owner of stock standing in the name of one Lubie, the allegation being that Marchand, having

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bought the stock from one Keenan, caused it to be transferred to Lubie for the purpose of concealing his ownership and avoiding liability under the act of Congress. The court decided the case on the ground that the evidence was not sufficient to show the actual ownership of Marchand, but there is nowhere an intimation that if the facts had been as alleged the action might not be sustained.

The present case shows that Stevens bought the stock from registered owners, and both assignments of their certificates with authority to complete the transfers on the books. As between Stevens and the vendors this made Stevens the owner. At that time the vendors could have registered their transfers, and thus, while relieving themselves from liability, charged Stevens. *Webster v. Upton*, 91 U. S. 71. If Stevens had omitted to register the transfer, and on that account his vendors had been compelled, as registered owners, to respond to their statutory liabilities for debts, I cannot think there would be a doubt of their right to call upon him to reimburse them for the money so paid. The reason is obvious. While the vendors were the registered owners, Stevens was the actual "shareholder," and the money paid by the vendors would have been for his use, and recoverable from him as such.

Stevens, by his transfers on the books, undoubtedly released his vendors from all future liability, because, as to them, the transfers were "out and out," in the language of English cases, and not colorable only. They retained no interest whatever, and Elston, the registered transferee, although pecuniarily irresponsible, was capable in law of assuming the obligations of a shareholder. As between Stevens and Elston, however, Stevens was the real owner, and Elston his authorized representative in the bank. As such representative, Elston could vote the stock at elections and receive the receipt for dividends. So, too, he could sell and transfer the stock on the books, and such sale and transfer to a *bona fide* purchaser would pass the title free from any claims of Stevens. Neither would the bank, under ordinary circumstances, be liable to Stevens for permitting the transfer to be made. So far as Elston was concerned, the transfer to him was colorable only, and it is apparent that the only object Stevens

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had in causing it to be made was to conceal his ownership, and thus, if possible, escape all statutory liability. Such being the case, I am unable to see how he can occupy any different position from what he would if the stock had been taken directly from his own name on the books and put in that of Elston. He is still the real owner, with Elston as his agent specially authorized to hold for him the legal title. Every principal is responsible for the obligations of his agency. The debt of the agent is the debt of the principal, and always recoverable from the principal. By the rules of law which govern the relations of principal and agent, the registry on the books in the name of Elston was, as between Stevens and Elston, in legal effect the same as a registry in the name of Stevens. The obligations which Elston assumed by reason of such registry were the obligations of Stevens.

Assuming then, as I must for the purposes of this case, that the facts were as they are claimed by the plaintiff to have been, I cannot reach any other conclusion than that Stevens, the decedent, was in law a "shareholder" of the bank at the time of its failure, and as such, liable in this action. It was error, therefore, to direct a verdict for the defendant.

The judgment of the District Court is reversed, and the cause remanded for a new trial.

STANTON, Receiver, v. WILKESON.

(8 Ben. 357.)

Receiver — power to sue in his own name — mode of enforcing assessments.

A receiver of a National bank is a Federal officer, and may sue in his own name to enforce assessments against stockholders, and for that purpose he may bring separate actions at law against the several stockholders.*

(Circuit Court, Southern District of New York.)

SUIT for an assessment. The opinion states the case.

Man & Parsons, for plaintiff.

George Gray and Henry Stanton, for respondent.

* To same effect, *Bailey, Receiver, v. Sawyer*, ante, p. 154.

BLATCHFORD, J. The plaintiff is the receiver of a National bank, which was organized under the act of February 25th, 1863. 12 U. S. Stat. at Large, 665. The defendant, at the time the bank suspended, was the holder of 100 shares of its capital stock, of the par value of \$10,000. This suit is brought to recover an assessment of 60 per cent, or \$6,000 thereon. The complaint is demurred to.

The first ground of demurrer is, that the plaintiff has no capacity to sue. It is contended that, as section 721 of the Revised Statutes provides that "the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply," the Code of Procedure of New York forbids the bringing of this suit by the plaintiff. The sections of the Code which are referred to are section 111, which provides that every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113; and section 113, which provides that a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. The plaintiff was appointed receiver by the Comptroller of the Currency on the 19th of September, 1873, under the provisions of section 50 of the act of June 3d, 1864. 13 U. S. Stat. at Large, 114. It is contended that the receiver is not the real party in interest, and is not a trustee of an express trust, and is not expressly authorized by the statute to sue. The 50th section of the act of 1864 (now section 5234 of the Revised Statutes) provides that the receiver shall take possession of all the assets of the bank and collect all debts, dues and claims belonging to it, and may sell all the property of the bank, and may, if necessary to pay the debts of the bank, "enforce the individual liability of the stockholders." The receiver is required to "pay over all money so made to the Treasurer of the United States," subject to the order of the Comptroller, and to make report to the Comptroller of all his acts and proceedings. It is quite plain, from these provisions, that the receiver and he alone is authorized

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to sue, either in his own name or in the name of the bank for his use, to collect the assets of the bank and to enforce the individual liability of the stockholders. No such authority is given to the Comptroller. No money can be made by any collection of assets, or by any enforcement of the individual liability of stockholders, unless it is made by the receiver, and the statute contemplates that he shall make it, and does not contemplate that any one else shall make it. No one else is required to pay over to the Treasurer any money so made, and no provision is made for the paying over to the receiver, by any other person, of any money so made. Hence it follows that the money which the receiver is to pay over, so far as it is made by collections by suit and enforcement by suit of the individual liability of stockholders, can come into the receiver's hands only through suits brought by himself in his own name or in the name of the association for his use. He is therefore authorized to sue in his own name. His right to sue to collect debts due to the bank, and his right to sue to enforce the individual liability of stockholders, rest upon the same provisions of law, and both of those rights have been sustained by abundant judicial authority. *Kennedy v. Gibson*, 8 Wall. 498; *Thomp. N. B. Cas.* 17; *Bank of Bethel v. Pahquioque Bank*, 14 id. 383, 401; *Thomp. N. B. Cas.* 77; *Bank v. Kennedy*, 17 id. 19; *Thomp. N. B. Cas.* 87.

I do not intend to intimate that the law of the State applies to this case, in respect to the capacity of the plaintiff to sue, because section 721 of the Revised Statutes makes the State laws applicable as rules of decision, in trials at common law, in the Federal courts, only where it is not otherwise provided by Federal enactment. In the present case, the power of the plaintiff to sue is conferred by, and grows out of, the provisions of section 5234 of the Revised Statutes.

It is also objected that this court has no jurisdiction of this suit. It is provided, by section 563 of the Revised Statutes, that the District Courts shall have jurisdiction "of all suits at common law brought by the United States, or by any officer thereof, authorized by law to sue." This is a suit at common law, as distinguished from a suit in equity, and the receiver is, as we have

seen, authorized by law to sue. The remaining question is, whether the receiver is an officer of the United States.

It has been held by the Supreme Court, in *United States v. Hartwell*, 6 Wall. 385, that a clerk appointed by an assistant treasurer of the United States, pursuant to a statute authorizing such appointment, with a prescribed salary, and whose tenure of place would not be affected by the vacation of office by the assistant treasurer, and whose duties, although such as his superior should prescribe, were continuing and permanent, is an officer within the meaning of the Sub-Treasury Act, and subject to the penalties prescribed by it for the misconduct of officers. He was appointed by the assistant treasurer with the approbation of the Secretary of the Treasury, under a statute which authorized the appointment of clerks in such manner. The court say, in that case, that the clerk was a public officer; that an office is a public station or employment, conferred by the appointment of Government; and that the term embraces the ideas of tenure, duration, employment and duties. A receiver of a National bank is in the public service of the United States. He is appointed pursuant to law. Vacation of office by the Comptroller does not vacate the receivership. His duties are continuing and permanent. The Secretary of the Treasury is declared by section 233 of the Revised Statutes to be the head of the Department of the Treasury. By section 324 the Comptroller of the Currency is made the chief officer of a bureau in the Department of the Treasury, charged with the execution of all laws passed by Congress relating to the issue and regulation of a National currency secured by United States bonds, and it is enacted that he shall perform his duties under the general direction of the Secretary of the Treasury. Receivers of National banks are authorized to be appointed by sections 5141, 5191, 5195, 5201, 5205, and 5234, under the circumstances prescribed in those several sections, which correspond to sections 15, 31, 32, 35 and 50 of the act of 1864, and section 1 of the act of March 3d, 1873. 17 U. S. Stat. at Large, 603. In only one of these sections is it enacted that the appointment of the receiver shall be made by the Comptroller with the concurrence of the Secretary of the Treasury. But this is implied;

and where the Comptroller appoints a receiver, the concurrence or approval or approbation of the Secretary of the Treasury is to be presumed, till the contrary appears, for the Comptroller is required to perform his duties under the general direction of the Secretary of the Treasury. See *Cadle v. Baker*, 20 Wall. 650; Thomp. N. B. Cas. 108. In *United States v. Hartwell*, it was held that the appointment of the assistant treasurer's clerk by that officer, with the approbation of the Secretary of the Treasury, constituted an appointment by the head of a department, within the meaning of the provision of the Constitution (art. 2, § 2), that Congress may, by law, vest the appointment of such inferior officers as they think proper in the heads of departments. This point has been decided in the same way by the District judge for the Eastern District of New York, in *Platt v. Beach*, 2 Ben. 303, and I entirely concur in his views.

It is further objected, that the proper remedy of the plaintiff is not by separate suits at law against individual stockholders, but by a suit in equity. The view urged is, that, if the 60 per cent assessed in this case shall turn out, if it be all collected, to be more than is necessary, there is no provision of law for refunding it; and that, if there are insolvent stockholders, who cannot pay the 60 per cent, another assessment may be sought to be made on stockholders who can pay, and thus they be compelled, perhaps, to pay more than their proper proportion of the debts.

The individual liability sought to be enforced in this suit is that imposed by section 12 of the act of 1864, now section 5151 of the Revised Statutes, as well as that imposed by the act of 1863, under which the bank in question was organized. The liability imposed by section 12 of the act of 1863 was in these words: "For all debts contracted by such association for circulation, deposits or otherwise, each shareholder shall be liable to the amount, at their par value, of the shares held by him, in addition to the amount invested in such shares." The act of 1864 and the Revised Statutes enact that the shareholders "shall be held individually responsible, equally and ratably and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value

thereof, in addition to the amount invested in such shares." The provisions of the acts of 1863 and 1864 in this respect do not differ in substance. The stockholder is to be individually liable, to the extent of the amount of his stock, at its par value, in addition to amount of the stock. The limit in amount or extent is the par value of his stock. Within this limit each stockholder is to be liable equally and ratably; that is, no one is to be assessed a larger percentage than any other one on the par value of his stock, and, when one is assessed a given percentage, every other one shall be assessed a like percentage. Each is to be liable in respect only of his own stock, and because he is a stockholder, and up to the full par value of his stock; but he is not to be liable in respect of the stock of any other stockholder, or because any other person is a stockholder, or beyond the full par value of his stock. This is a several liability. The stockholders are not jointly liable. There is no contribution among them provided for, whereby one of them has any right to call any other one directly to account, in contribution, in respect of any sum paid in discharge of the statutory liability. The proceedings are not taken by first ascertaining how much is necessary to be collected, and then apportioning that amount among the stockholders, and then collecting, by suit or otherwise, the sum so apportioned. The Comptroller is to make an assessment, by determining how much each stockholder must be liable for, in a percentage on the par value of his stock. These views of the statute are those determined by the Supreme Court in *Kennedy v. Gibson*, 8 Wall. 498, Thomp. N. B. Cas. 17, which case is approved in *Sanger v. Upton*, 1 Otto, 56. There is nothing in the case of *Pollard v. Bailey*, 20 Wall. 520, that is in conflict with these views. That was an action at law by a creditor against a stockholder in a State bank, to recover the amount of the creditor's debt, under a statute which declared that individual stockholders in the bank should be "bound respectively for all the debts of the bank, in proportion to their stock holden therein." In delivering the opinion of the court in that case, Chief Justice WARRE points out, that by the provisions of the statute in that case, each stockholder is bound for the debts in proportion to his stock; that his liability is not limited to the par value of his stock, and he is not

bound absolutely for the payment of the full amount of that ; that he must pay a sum which shall bear the same proportion to the whole indebtedness that his stock bears to the whole capital, and is not required to pay more ; that no stockholder is liable for more than his proportion of the debts ; that such proportion can be ascertained only upon an account of the debts and stock, and a *pro rata* distribution of the indebtedness among the several stockholders ; that the proper action in such case is one in equity, to state an account and make distribution ; and that the case is different from one where the statute provides generally that all stockholders shall be individually liable for the payment of the debts. The latter is the liability prescribed by the statutes in relation to National banks, the liability being limited, however, to the par value of the stock. The court manifestly did not intend that the decision in *Pollard v. Bailey* should apply to the liability of stockholders in National banks.

The suggestion that where there is an enforced contribution of too much, from stockholders, there is no provision for refunding it, is not a sound one. In addition to the fact that in such a case, the stockholders would have a right to enforce the refunding by suit, the provision of section 50 of the act of 1864, now section 5236 of the Revised Statutes, is not open to the criticism made upon it, that it only directs that the surplus of the proceeds of the assets of the bank shall be paid to the stockholders, and does not provide for the payment back to them of surplus money collected in enforcement of their individual liability. If it were necessary, the money collected from stockholders might fairly be considered as the proceeds of assets of the bank, for the purpose of the statute ; but at all events, as the statute provides that the money to be made by enforcing the liability of stockholders is to be paid to the Treasurer, subject to the order of the Comptroller, and that the Comptroller is to make dividends of such money and other money, and that the remainder of the proceeds, after paying the debts, shall be paid to the shareholders, it is entirely clear that such proceeds include surplus money collected from stockholders.

It is not necessary now to anticipate or decide any question in

regard to a second assessment. No considerations growing out of the same properly affect any question arising on this demurrer.

The cases of *Kennedy v. Gibson* and *Sanger v. Upton* decide that the Comptroller is vested with authority to determine the extent to which the individual liability of stockholders is to be enforced. This decision was followed by the District Court for the Eastern District of New York, *Strong v. Southworth* (*post*, p. 172).

The complaint alleges, that the assets of the bank are insufficient to pay "its debts and liabilities," and that in order to provide for paying the same, it is necessary to enforce the personal liability of the stockholders; and that the Comptroller has determined that such assets are insufficient to pay such "debts and liabilities," and that it is necessary, in order to pay "the same," to enforce to the extent named in the complaint the individual liability of the stockholders. The criticism is made, that the liability imposed by the statute is for all "contracts, debts and engagements" of the bank, and that the statute (section 5234) provides that such individual liability may be enforced only where it is "necessary to pay the debts" of the bank, and not for the purpose of paying "liabilities of the bank." It is a sufficient answer to this criticism to say, that the complaint, after the foregoing averments, goes on to set out in *hæc verba* the determination or assessment made by the Comptroller, and that in that, it is stated that he determines that the assessment is necessary to pay the duly proven debts of the bank. Moreover, there could have been no intention, by the language of section 5234, "to pay the debts," to narrow the individual liability imposed by section 5151, which is for all "contracts, debts and engagements," and the word "liabilities" imports no broader meaning than the word "debts" in section 5234, when the word "debts" in that section must necessarily be held to include the "contracts, debts and engagements" mentioned in section 5151.

The demurrer is overruled, with costs, with leave to the defendant to answer in twenty days, on payment of costs.

IN RE DURYEA.

(17 National Bankruptcy Register, 495.)

Forum — question of power to lend money on mortgage.

An assignee in bankruptcy should be permitted to litigate in the Federal court a question involving the powers of a National bank to make loans of a particular character on real mortgage, and not remitted to the State court.

(District Court, Southern District of New York.)

THE opinion states the case.

Fellows & Irvine, for assignee.

S. Dominick, for J. S. Young.

H. T. Anderson, for Chatham National Bank.

Norwood & Coggeshall, for Bowery Savings Bank.

CHOATE, J. In this case several motions have been submitted together. The bankrupt owned two pieces of real estate in the city of New York, one in Cherry street, the other in East Thirty-ninth street, near Fifth avenue. The Cherry street property is subject to a first mortgage held by the Bowery Savings Bank, on which there is due about nine thousand dollars, and to a second mortgage for eight thousand eight hundred dollars, held by the Chatham National Bank. The first mortgage is not contested by the assignee. Foreclosure proceedings have been commenced by the Bowery Savings Bank, and have been restrained by the injunction of this court. The second mortgage is contested by the assignee as invalid, as made in violation of the provisions of the National Banking Laws. They are also liens for judgments against the bankrupt for about four hundred dollars. The value of the property is estimated at about sixteen thousand dollars. The Thirty-ninth street property is subject to: taxes, one thousand one hundred and fifty-five dollars; judgment, four hundred dollars; a first mortgage to the Seaman's Savings Bank for eight thousand

five hundred and sixty dollars; a second mortgage to J. S. Young for five thousand three hundred and eighty dollars, neither of which is contested, and a third mortgage to the Chatham National Bank for seven thousand dollars and interest, which is contested by the assignee on the ground stated above. Young and the Chatham National Bank have commenced actions for foreclosure in the State courts. The assignee now moves for leave to sell at public auction the Cherry street property. This motion is opposed by the Bowery Savings Bank and the Chatham National Bank. The Bowery Savings Bank and the Chatham National Bank and Young move to dissolve the injunctions restraining them from prosecuting their foreclosures. The Bowery Savings Bank moves to modify the injunction, so as to allow it to proceed at least to the entry of judgment. Upon the facts shown I am satisfied that the injunctions against the mortgagees, restraining their suits in foreclosure, should not be dissolved. If the mortgages of the Chatham National Bank are held invalid, there is a considerable interest in the Cherry street property in the bankrupt's estate, and in the Thirty-ninth street property there may be such an interest after the admitted mortgages and other liens on those properties are satisfied. What the amount of that interest is in both cases depends upon the determination of the question of the validity of the mortgage held by the Chatham National Bank, a question involving the powers of National banks to make loans of a particular character upon mortgage. The question is one on which the assignee should be permitted to litigate in the Federal court, and he should not be sent into the State courts to try this question on the distribution of surplus moneys in a foreclosure suit, or in a suit brought by the party holding the alleged invalid mortgage in the State court.

Strong, Receiver, v. Southworth.

STRONG, Receiver, v. SOUTHWORTH.

(8 Ben. 331.)

Assessment on stockholders — determination of Comptroller.

The determination of the Comptroller, as to the necessity of an assessment on stockholders of an insolvent National bank, for the payment of debts, is conclusive, and in a suit to enforce such an assessment the necessity need not be alleged.*

(District Court for Eastern District of New York.)

SUIT for assessment against a stockholder. The opinion states the case.

Nash & Holt, for complainant.

Charles O. Tracy, for respondent.

BENEDICT, J. This case comes before the court upon a demurrer to the complaint. The complaint alleges in substance that on April 26th, 1873, the Atlantic National Bank of New York was a National bank duly organized and doing business, and on that day failed, and plaintiff was thereupon appointed receiver of its assets; that the Comptroller of the Currency has made an assessment upon the shareholders of the bank of one hundred per cent of their shares, and has directed suits to be brought to collect such assessments, and that defendant is a shareholder and has not paid the assessment. Judgment is demanded for the amount of the par value of defendant's stock. The defendant demurs. The only ground of demurrer here insisted on is, that the complaint does not show that one hundred per cent upon the shares of the bank is needed by the receiver, but simply avers that the Comptroller of the Currency has made an assessment of one hundred per cent upon the shares of the bank, and has directed actions to be brought to collect such assessment.

This question was considered by the Supreme Court of the

*To same effect, *Bailey, Receiver, v. Sawyer*, ante, p. 154.

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United States in *Kennedy v. Gibson*, 8 Wall. 498; Thomp. N. B. Cas. 17, and the Supreme Court there say: "It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much shall be collected. These questions are referred to his judgment and discretion, *and his determination is conclusive. The stockholders cannot controvert it.*"

It is however insisted that this portion of the opinion is *obiter* and not binding upon this court. I cannot so consider it. The precise question before the court in *Kennedy v. Gibson* was whether the bill must contain an averment, that the Comptroller of the Currency had decided an assessment to be necessary, and directed the suit to be brought. The functions and duties imposed upon the Comptroller by the statute were therefore the precise questions before the court. In deciding that his duties were, so to speak, judicial, in determining upon the necessity of an assessment and of suits to enforce it, the court necessarily decided that his determination on those points would be conclusive. I feel bound therefore by the decision of the Supreme Court, in that case, here to decide the complaint to be sufficient in respect to the allegation referred to.

BLAIR V. FIRST NATIONAL BANK OF MANSFIELD.

(10 Chicago Legal News, 84.)

Bank officers may borrow money of bank.

An officer of a National bank may borrow money of the bank.

(Circuit Court, Northern District of Ohio.)

The trial judge charged, among other things:

"The president, cashier or director of a National bank may borrow money from the bank, as any other person may, and execute a valid note for the same, that will bind them as well as the bank re-

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ceiving it; and such notes are not void, nor, in the absence of fraud, can such note be repudiated or avoided by the bank by reason of that relation."

"The fact that the plaintiff knew that Hickox, the maker of the note, was the president of the First National Bank (defendant), was not such a circumstance as would constitute notice to the plaintiff to destroy his character of innocent holder of the note, or put him upon inquiry as to the character of the note."

Slade & Kline and L. R. Critchfield, for plaintiff.

M. E. Dickey & H. C. Hedges, for defendant.

EMMONS, J. The action is upon an indorsement by the defendant's bank, as organized under the National Banking Law. The note was regularly indorsed, by due course of trade, by the cashier of the defendant, a full consideration paid by the Tiffin Savings Bank. The latter bank transferred it for full consideration to the plaintiff before maturity. The defendant now moves for a new trial upon the ground, that as it appeared the maker of the note was insolvent, was president of the bank, and by connivance with the cashier fraudulently obtained the discount of the note by the defendant, in view of this fact, the court should have charged the jury, that inasmuch as the note was made by a person who was also president of the bank, the discount was *per se* unlawful, and that the note on its face put the plaintiff upon inquiry, and authorized the defendant to prove, as against him, the want of consideration.

It is somewhat difficult to deal with such a proposition. If there is any possible defense in a case like this, it is only upon the broad ground that the president of a bank is incompetent in all cases to become a borrower from his bank, and that his paper is in all instances unlawful.

This is not a case of failure of consideration. The contract given in evidence is one for which the defendant received full consideration. The savings bank and its transferee, the plaintiff, has nothing to do with solvency or insolvency of the maker of the note. They dealt with the bank which indorsed it.

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If there is any defense, it must be on the ground of illegality, that the transaction is *ultra vires*, or so at war with public policy as to become void at common law.

If such grounds can be maintained, then of course all parties to an unlawful transaction can set that up as a defense.

No case has been referred to, showing that a bank officer or director cannot borrow as freely as other persons, so as the loans are honest and the borrowers do not themselves participate in authorizing the loan.

On page 99 of Morse on Banking, after discussing the general doctrine, that so far as the bank itself is concerned, but not as to third persons, it is unlawful for a director to vote upon a matter in which he is personally interested, adds that:

"In the absence of legislative prohibition there is no rule of the common law which prevents the making of a loan or discount to a director, any more than to any other person." *Coneyhaus' Appeal*, 57 Penn. St. 474.

The distinction is plain in principle, as it has always been recognized in actual administration, between being interested in a valuable contract and in borrowing money at a lawful rate of interest.

It has never been deemed a breach of trust for an officer of a corporation to borrow its money. Ang. & Ames on Corp. 296 and 297, §§ 299 and 300.

A cashier may transfer the securities of the bank in the usual course of business.

It being entirely clear that a bank director or officer may, in the ordinary course of business, borrow money of the corporation, it would have been error for the judge to have charged the jury that the mere form of paper showing he had done so was notice to the plaintiff of any fraud upon the bank.

It is unnecessary to say that irregularities in the conduct in the internal affairs of a corporation do not bind third parties who had no notice, for here it does not appear that any irregularity had occurred. At most, it is a fraudulent discount of paper to an insolvent party.

In such a case the defendant concedes that a third party taking

First Nat. Bank of Youngtown v. Hughes, etc.

the paper from the bank itself, paying full consideration, may recover on its indorsement.

The motion for new trial is overruled, and judgment on the verdict.

FIRST NATIONAL BANK OF YOUNGTOWN v. HUGHES, Auditor, and
JOHNSON, Prosecuting Attorney, of Mahoning County.

SECOND NATIONAL BANK v. SAME PARTIES.*

Taxation of deposits — compelling exhibition of books.

The officers of a National bank cannot be compelled to exhibit the books of the bank to State officers for the purpose of furnishing a basis for State taxation of the deposits as against the depositors.

(Circuit Court, Northern District of Ohio.)

BILLS in equity seeking relief from certain proceedings instituted against them in Mahoning county.

The auditor of said county, under section 2782 of the Revised Code of Ohio, issued a process against the cashier of said bank, requiring him to appear before him to give testimony in reference to persons who were depositors in the bank, and the amount of such deposits, in order to reach such sums for taxation to the depositors, and also a compulsory process to require the cashier to bring before him for inspection, the books of the bank showing such deposits. The cashier appeared in person and was willing to testify, but refused to bring the books, under the order of the board of directors.

The auditor then, under section 2783, made application to the probate judge for such compulsory order, which was duly issued by the probate judge, requiring said officer of the bank to appear before him, and bring with him the books of the bank for inspection and examination. This application was for a restraining order against said auditor and prosecuting attorney under section 5241 of the Revised Statutes (act relating to National banks).

* Not yet reported.

National State Bank of Camden v. Pierce.

Held (WELKER, J.), that the officers of National banks cannot be compelled to present for inspection, either to the auditor or probate judge, their books showing the deposits of the bank, and therefore defendants were restrained from compelling the same to be done.

NATIONAL STATE BANK OF CAMDEN V. PIERCE.

(18 Albany Law Journal, 16.)

National bank can be located in but one place.

A National bank located in New Jersey, for the convenience of persons in Philadelphia kept a clerk in that city who received deposits. *Held*, that the bank did not become located in Philadelphia so as to be liable to taxation.

(Circuit Court, Eastern District of Pennsylvania, 1878.)

BILL to procure an injunction to restrain the bank assessors of the State of Pennsylvania from returning an assessment upon the capital stock to the Auditor-General of the State, and to have the assessment declared illegal. It appeared from the bill set forth that the plaintiff was a National bank engaged in business in New Jersey; that for the convenience of persons in Philadelphia desiring to deposit money therein, it kept a clerk in an office in that city, to receive deposits and to deliver them to the bank in Camden, N. J., at the close of each day; that the defendants, who were the bank assessors of the State of Pennsylvania, had served on the plaintiff a notice of an assessment of a tax upon the entire capital stock of the bank; that said assessment, which was made under acts of the assembly of Pennsylvania of April 12, 1867, April 2, 1868, and December 22, 1869, was contrary to law and void; that the plaintiff had taken an appeal from the assessment in due time, but the assessors refused to vacate or alter the assessment.

John Goforth (with him *C. S. Carson*), for plaintiff.

S. G. Thompson, for defendants.

First National Bank of Uniontown v. Stauffer.

McKENNAN, J. (CADWALLADER, J., concurring.) We have decided, after full discussion, that even when a corporation carries on business in a State, it does not thereby become an inhabitant of it, and we cannot go farther and say that by similar conduct a corporation becomes located therein.

Injunction granted.

FIRST NATIONAL BANK OF UNIONTOWN V. STAUFFER.

(1 Federal Reporter, 187.)

Usury.

The receipt by a National bank of an usurious rate of interest upon the discount of a note works a forfeiture of interest accruing after the maturity of the note, as well as before maturity.

(Circuit Court, Western District of Pennsylvania.)

ACTION upon a promissory note against an accommodation indorser. The opinion states the case.

J. M. Stoner, for plaintiff.

T. C. Lazear, for defendant.

McKENNAN, J. This case was tried before the late Judge KETCHAM, and under his instructions, a verdict was rendered in favor of the plaintiff for the amount of the note in suit, with interest from its maturity to the date of the verdict. A motion for a new trial was made by the defendant, for the reason, that under the circumstances no interest was recoverable upon the note, and that it was error in the judge to instruct the jury otherwise.

It is admitted that more than the legal rate of interest was charged and received by the plaintiff for the period which elapsed between the date and maturity of the note, and the question is whether this subjects the plaintiff to a forfeiture of the interest which accrued afterward.

The National Currency Act furnishes a clear answer to this question. After fixing the rate of interest to be taken by National banks at that allowed by the local law, the thirtieth section of that act (Rev. Stat., § 5198) enacts: "And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged to be a forfeiture of the *entire* interest which the note, bill or other evidence of debt *carries with it*, or which has been agreed to be paid thereon;" and it is further provided, that where excessive interest has been paid, *twice* the amount may be recovered by an action commenced within two years.

The "*entire*" interest which the note "carries with it" is forfeited; and if this means *all* the interest which accrues upon it, as I think it clearly does, it is difficult to understand how any part of it is recoverable. By the operation of the act an usurious contract is inherently vicious, so that it cannot "carry" any interest "with it;" hence it would inadequately effectuate the intent of the act to hold that such a contract is purged of its taint, and is invested with a capacity denied to it before, by the failure of the debtor to pay the debt evidenced by it, at maturity.

This view of the effect of the act of Congress is not inconsistent with the opinion of the court in *Barnet v. Nat. Bank*, 8 Otto, 555 (*ante*, 18), as was urged in the argument, but is in entire harmony with it. There it was sought to set off usurious interest paid upon a series of renewed bills, and also twice the amount of such interest, and it was held that the only remedy of the debtor was a penal action, as provided by the last clause of section 30. In expounding this section the court say: "Two categories are thus defined, and the consequences denounced:

"1. Where illegal interest has been knowingly stipulated for, but not paid, then only the sum lent, without interest, can be recovered.

"2. Where such illegal interest has been paid, then twice the amount so paid can be recovered, in a penal action of debt or suit in the nature of such action against the offending bank. * *"

It is thus declared that the effect of a mere stipulation for illegal interest by a National bank is to deprive it of the right to

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recover more than "the sum lent, without interest;" but surely the "receiving" of illegal interest in furtherance of a stipulation to that effect cannot place the bank upon any better footing. It will undoubtedly preclude the recovery, by the debtor, of the penalty for an usurious payment, by way of set-off against his debt, but it cannot invest the creditor with a right to recover what the law declares he shall forfeit by reason of his unlawful agreement.

In this case it was agreed that usurious interest should be paid, and was paid to the plaintiff, and the jury should have been instructed that this worked a forfeiture of all the interest upon the note, and that the plaintiff was entitled to recover only its face amount. A new trial will therefore be ordered, unless the plaintiff, within ten days, shall remit the excess of the amount found by the jury on the principal of the debt. Upon the entry of such remitter, judgment will be entered on the verdict for the amount so rendered.

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(25 Internal Revenue Record, 64.)

Jurisdiction of Federal courts.

The Federal Circuit Court has unconditional jurisdiction of all suits to which a National bank is a party, irrespective of amount or citizenship.

(Circuit Court, Western District of Pennsylvania.)

THE opinion states the facts.

A. N. Sutton and W. S. Purviance, for rule.

Miller and McBride and Charles McCandless, contra.

McKENNAN, J. A careful examination of the main question involved in this motion has constrained me to change the opinion which I entertained at the argument. Under the Pennsylvania decisions, the instrument on which the suit and confession of judgment here are founded is a non-negotiable promissory note. Such

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instruments are not assignable at common law, and hence they are suable only in the name of the original payee. The State statute of May 28, 1715, provided for the assignment of "bonds, specialties and notes in writing," by the persons to whom they are made payable, and that the assignee thereof may maintain suit thereon in his own name. Under the first section of the act, any form of assignment expressive of the purpose of the assignee to vest the ownership of the instrument in the assignor would effectuate its intent, but the eighth section requires a seal and attestation by two witnesses of "bonds and specialties," while the assignment of the remaining subjects of the act—"notes in writing"—is not restricted by any prescribed formula. The note in this case was duly assigned by "the person to whom it is made payable" to the First National Bank of Butler, so as to enable the bank to bring suit on it, in its own name, according to the provisions of the act of 1715.

Can such suit be maintained in this court, both parties being citizens of Pennsylvania? Under the Judiciary Act of 1789 it is clear that it could not, both because the legal parties are not citizens of different States, and because the assignor of the note in suit could not maintain it on account of his residence in the district. But the National Currency Act seems to have abrogated these conditions so far as they may affect National banks organized under it.

The 57th section of that act enacts that Circuit Courts shall have original jurisdiction "of all suits by or against any banking association established in the district for which the court is held, under any law providing for National banking associations, and this clause is re-enacted by the Revised Statutes, in chapter 7, defining the jurisdiction of the Circuit Courts. The enactment of the clause was clearly unnecessary to confer jurisdiction upon the Circuit Courts of suits by and against banking associations, because as corporate bodies they might sue or be sued in such courts, under the Judiciary Act, when the conditions prescribed by that act existed. That was manifestly not its object. But it is an unconditional grant of jurisdiction of all suits by or against National banks to the Circuit Courts of the district in which such

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banks are established, and is limited to those courts. Hence the more reasonable hypothesis is that it was intended to enable National banks to sue and be sued in the Circuit Courts of their several districts alone, irrespective of the conditions, as to the amount in controversy and the citizenship of the parties, which are imposed upon the right by the Judiciary Act. So it has been held in several cases decided in the Circuit Courts, where suits were instituted by National banks as the indorsee of commercial paper. The note in this case is not negotiable. But although in most of their characteristic qualities the instruments are unlike, and the legal effect of their transfer is in some respects different, yet what reason is there for a discriminating application of the statutory provision, where the right to sue in his own name by an assignee or indorsee is just as full and complete in one case as in the other? The terms of the statute embrace all suits alike, and their fair import is, that of all suits, which a National bank may rightfully institute in its own name, the Circuit Court of the district in which it is established may entertain jurisdiction.

The motion to set aside the judgment must therefore be denied, and the plaintiff has leave to amend the declaration and confession of judgment by striking out the name of "Alexander Mitchell for use," so that the First National Bank shall stand as the legal plaintiff on the record.

 FIRST NATIONAL BANK OF MT. PLEASANT V. TINSTMAN.

(36 Legal Intelligencer, 236.)

Rate of interest.

Under the National Banking Act, any National bank in Pennsylvania can charge and take the same rate of interest as any State bank of issue is authorized to charge.

(Circuit Court, Western District of Pennsylvania.)

CASE stated. And now, December 28th, 1878, it is hereby agreed by and between the parties to the above suit that

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the following case be stated for the opinion of the court in the matter of a special verdict.

The plaintiff is a National bank, duly organized and incorporated in 1868 under the acts of Congress of the United States providing for the incorporation and regulation of National banks, and is located at Mt. Pleasant, in the State of Pennsylvania, where it has been carrying on business since 1868.

On the 1st day of October, A. D. 1875, the defendant being then indebted to the plaintiff gave to it in good faith to secure said pre-existing debt a mortgage, dated October 1st, A. D. 1875, and duly recorded in the recorder's office of Westmoreland county, Pennsylvania, in mortgage book, vol. 9, page 28, which is the mortgage upon which the above suit was brought.

The indebtedness originated in manner as follows: The defendant, desirous of procuring a loan from the plaintiff, procured his (defendant's) brother, A. O. Tinstman, to indorse defendant's note for him (defendant), and defendant took this note to the plaintiff. Whereupon the plaintiff, knowing the indorsement to be for the accommodation of the maker, took the note, deducted from the face of it the amount of interest agreed upon, to wit, at the rate of nine per centum per annum, and paid to the defendant the balance in money. This note was renewed from time to time at the same rate of interest until the mortgage was given on the 1st day of October, 1875, which was given for the amount then due on said loan for debt and interest as aforesaid. The total sum of the said precedent debt, principal and interest, was \$8,233.79. The rate of interest taken, charged and received by the bank on account of said indebtedness was agreed upon between said bank and said defendant, and was nine per centum per annum, and amounts in the aggregate to the sum of \$3,134.20, and was so taken by said bank between the 28th day of July, A. D. 1871, and the 1st day of October, A. D. 1875.

The defendant admits that plaintiff is entitled to a judgment in this case for \$5,099.59, being the whole of said principal, less said \$3,134.20, but the plaintiff claims a judgment for the whole of said \$8,233.79, with interest from June 4, 1876.

The following named banks of the State of Pennsylvania have

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from the date of their respective charters, by special acts of assembly, been organized and carrying on business under said charters and acts in the State of Pennsylvania, and said acts of assembly of the State of Pennsylvania herein referred to by title and date of approval shall be considered as though they were each recited at length herein, and may be so regarded for the purposes of this case:

An act entitled "An act to incorporate the Monayunk Bank, located in the city of Philadelphia." Approved June 14th, A. D. 1871.

An act entitled "An act to incorporate the Bank of America." Approved April 27th, A. D. 1870.

An act entitled "An act to incorporate the People's Bank of Philadelphia." Approved February 25th, A. D. 1870.

An act entitled "An act to incorporate the United States Banking Company." Approved June 2d, A. D. 1871.

An act entitled "An act to incorporate the Twenty-second Ward Bank of Germantown." Approved May 17th, A. D. 1871.

An act entitled "An act to incorporate the Iron Bank of Philadelphia." Approved May 19th, A. D. 1871.

An act entitled "An act to incorporate the Iron Bank of Phoenixville." Approved May 4th, A. D. 1871.

An act entitled "An act to incorporate the State National Bank." Approved June 2d, A. D. 1871.

An act entitled "An act to incorporate the Tenth Ward Bank of Philadelphia." Approved March 12th, A. D. 1872.

An act entitled "An act to incorporate the City Bank of Scranton." Approved March 20th, A. D. 1871.

An act entitled "An act to incorporate the State Bank of Delaware County." Approved May 19th, A. D. 1871.

An act entitled "An act to incorporate the Butchers and Drovers' Bank." Approved April 27th, A. D. 1870.

An act entitled "An act to incorporate the Market Bank." Approved April 27th, A. D. 1870.

An act entitled "An act to incorporate the Quaker City Bank." Approved May 23d, A. D. 1871.

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An act entitled "An act to incorporate the Franklin Bank." Approved April 1st, A. D. 1870.

An act entitled "An act to incorporate the West End Bank of Philadelphia." Approved November 20th, A. D. 1871.

An act entitled "An act to incorporate the Southwark Banking Company." Approved June 2d, A. D. 1871.

True copies of three of the charters of these banks are hereto attached as part hereof.

Each of said banks claims the right to issue its own bank notes under the said acts of assembly and the acts of assembly herein-after referred to; but no one of said banks ever issued its own bank notes, and the defendant claims that under said acts of assembly none of said banks have the right to issue.

And the following acts of assembly of the State of Pennsylvania, referred to by title and date of approval, shall be considered as though they were each recited at length herein, and may be so regarded for the purposes of this case:

An act entitled "An act for reducing the interest of money from eight to six per cent per annum. Approved March 2d, A. D. 1823.

An act entitled "An act regulating Banks." Approved April 16th, A. D. 1850.

An act entitled "An act regulating the rate of interest." Approved May 28th, A. D. 1858.

An act entitled "An act to establish a system of free banking in Pennsylvania, and secure the public against loss from insolvent banks." Approved March 31st, A. D. 1860.

An act entitled "A supplement to an act to establish a system of free banking in Pennsylvania, and to secure the public against loss from insolvent banks, approved March 31st, A. D. 1860." Approved May 1st, A. D. 1861.

And the supplements and amendments to any and all of said acts and all of the aforesaid acts and the various supplements thereto may be copied and added hereto by either party at any time during the pendency of this suit, and the other party shall consent thereto.

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If the court should be of opinion on the above stated facts that the plaintiff could lawfully take, charge and receive of and from the defendant by agreement between the plaintiff and defendant on such a direct loan interest at the rate of nine per centum per annum, then judgment shall be entered in favor of the plaintiff for the sum of \$8,233.79, with interest from June 4, 1876; but if the court should be of opinion that the plaintiff could not legally take, charge and receive by agreement as aforesaid, interest at the rate of nine per centum per annum, but that the same was usurious, and that the offset of \$3,134.20 was claimed by the defendant in due time under the acts of Congress, then judgment shall be entered for the plaintiff for the sum of \$5,099.59, with such, if any, interest it may be entitled to under the above stated facts, either party reserving the right to sue out a writ of error.

(Signed)

D. T. WATSON,

Attorney for Plaintiff.

(Signed)

WELTY McCULLOUGH,

Attorney for Defendant.

December 21, 1878.

For the plaintiff, it was argued that the several acts incorporating the State banks, taken in connection with the several banking laws of the State, gave these banks power to issue. That having the *power* it was immaterial whether it had ever been exercised. That as the charters of these banks permitted them to receive on the discount of notes, etc., such an amount of interest as was agreed upon between the customer and the bank, that therefore under section 5197 of the Revised Statutes of the United States any National bank of Pennsylvania could take and charge the same. *First National Bank of Mt. Pleasant v. Duncan*, Thomp. N. B. Cas. 360.

Plaintiff further contended, that Congress intended National banks to be National favorites; that they intended to give them the vantage ground as against State banks. *Tiffany v. Bank of Missouri*, 18 Wall. 410; Thomp. N. B. Cas. 90.

It therefore gave to the National bank in each State the power to take, receive, etc., such a rate of interest as by the laws of the

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State is allowed to banks of issue. It is obvious that the mere fact of the State banks of issue being incorporated, each by a special act, or all under general act, is immaterial, if the power is given to them to charge more than the general rate fixed for natural persons by general law of the State; otherwise the State banks would have the vantage ground.

The defendant claimed that section 5197 referred to the general laws of a State, and not to any special law incorporating and granting any special privilege to one particular bank, and that as the general law, in reference to interest, limited in Pennsylvania the rate to six per cent, a National bank in Pennsylvania could take or charge no more. Act of May 28, 1858, § 1, P. L. 622; Purdon's Digest, 803, pl. 1.

The court (McKENNAN, Circ. J.) Judgment is hereby rendered for the plaintiff in the within case for \$8,233.79, with interest from June 4, 1876.

[An appeal to the United States Supreme Court was dismissed.]

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(8 Weekly Notes of Cases, 131.)

Transfer of stock — foreign executor.

In the absence of any provision in the by-laws or articles of association of a National bank to the contrary, such a bank is bound under the laws of Pennsylvania to recognize a transfer of its stock by a foreign executor duly appointed in another State.

(Circuit Court, Eastern District of Pennsylvania.)

CASE stated, wherein Elizabeth T. Hobbs, a citizen of the State of Maine, was plaintiff, and the Western National Bank of Philadelphia, a corporation organized under the laws of the United States and doing business in the State of Pennsylvania, was defendant, showing the following facts:

Adeline T. Kittredge, the owner of certain shares of the capi-

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tal stock of the corporation defendant, was a resident of, and died in, the State of Illinois in 1879, having duly made her will, which was admitted to probate there, and letters testamentary issued to Charles E. Towne by the probate court. The testatrix bequeathed the said stock to the plaintiff, Abby W. Wells, and George W. Kittredge.

The executor, in distribution and settlement of the estate transferred the said shares to the plaintiff, and indorsed the said assignment and transfer upon the testator's certificate.

A duly certified copy of the will was filed in the office of the register of wills for the county of Philadelphia, but letters under the said will were not applied for, or granted by, the said register of wills.

The plaintiff, producing the certificate aforesaid, with the transfer indorsed thereon, and a duly certified copy of the letters testamentary issued by the said probate court, and a duly certified copy of the will as filed in the office aforesaid in Philadelphia, requested the defendant to transfer to her the said shares of stock, and to issue to her a new certificate therefor. The defendant, acting under the advice of counsel, refused to do so.

Rev. Stat., section 5139, enacts :

"The capital stock * * * * shall * * * * be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association."

The defendant's by-laws and articles of association are silent on the subject.

If the court shall be of opinion that the plaintiff is entitled to the said transfer and new certificate, then judgment to be entered in favor of the plaintiff; otherwise judgment to be entered for the defendant.

Cuyler & Gest, for plaintiff.

C. Stuart Patterson, contra. The shares of the capital stock of a National bank are choses in action, not chattels in possession. They do not follow the domicile of their owner, but their *situs* is that of the corporation. 3 Burge, 751; Angell & Ames, §§

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560-561; Story's Confl. of Laws, § 383; *Robinson v. Bland*, 2 Burr. 1077; *Att'y-Gen'l v. Higgins*, 2 H. & N. 339; *Mechanics' Bank v. New York and New Haven R. R.*, 3 Kern. 627; *Arnold v. Ruggles*, 1 R. I. 165, 173; *Gilpin v. Howell*, 5 Barr, 57; *Slaymaker v. Gettysburgh Bank*, 10 id. 373; *Van Allen v. Assessors*, 3 Wall. 584; Thomp. N. B. Cas. 1. The National banks are Federal agencies and not subject to State control. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. U. S. Bank*, 9 id. 738; *Pittsburgh v. First National Bank*, 5 Sm. 48; Thomp. N. B. Cas. 936. Letters testamentary, or of administration, have at common law no extra-territorial force. Story's Confl. of Laws, § 512; *Mothland v. Wireman*, 3 Penr. & W. 185; *Preston v. Melville*, 8 Cl. & F. 12; *Enokin v. Wylie*, 10 H. L. 19; *Fenwick v. Sears*, 1 Cr. 259; *Dixon v. Ramsey*, 3 id. 319; *Noonan v. Bradley*, 9 Wall. 394. The statute law of Pennsylvania does not authorize a foreign executor to transfer the stock of a National bank located in Pennsylvania.

BUTLER, J. The stock is the personal property of the shareholder (so declared by the act of Congress), having all the ordinary incidents of such, liable to transfer by sale, and all other means ordinarily applicable to such property. On the owner's death it passes to his legal representatives, and is disposed of under the laws of the State, in the usual course of administration, as any other personalty of which he may die possessed.

The purpose of the acts of assembly of 1836 and 1872 was, and their effect is, to invest executors and administrators, under letters granted by other States of the Union, with the same authority over "shares of stock of any incorporated company, of" or "within this Commonwealth, standing in the name of the decedent," as that conferred by letters granted here. The language was certainly intended to embrace all stock of every description, which may pass to the legal representatives; and was designed to avoid the necessity for administration here. It is sufficiently comprehensive, we think, to include the stock of a National bank, which, though not incorporated by the laws of the State, is, nevertheless, a corporation "within the Commonwealth,"

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as contemplated by the act of 1836, or "of the Commonwealth," as contemplated by that of 1872. The location of the bank is here — so fixed by the act of Congress, and declared by the certificate issued under it. It can transact business nowhere else; and may accurately be described as a corporation *within* or *of* this Commonwealth. Besides, if the language were less distinct, the act, being remedial in its nature, should receive a liberal interpretation, so as to embrace, if possible, the full extent of the mischief or difficulty contemplated. There is certainly as much reason for applying such a provision to one kind of stock, passing to the legal representatives of the deceased owner, as to another.

The plaintiff must be regarded, therefore, precisely as if the executor of Mrs. Kittredge's will had administered here. That the bank could safely recognize the transfer, under such circumstances, and therefore should do so, cannot well be doubted. It is not subject to the control of the State. But as its stockholders may transfer their interests, or the same may be transferred, by any method provided by the laws of the State for the transfer of similar property (in the absence of other provision by Congress), the defendant cannot thwart the purpose to do so.

If the bank had prescribed a method of transfer, as contemplated by the act of Congress, the question now presented would probably have been avoided. But having failed in this, the duty of recognizing a transfer in pursuance of the laws of the State (the only method available to the plaintiff) is, we think, reasonably clear. The failure to discharge this duty is sufficient to support the suit. Judgment must therefore be entered for the plaintiff.

FIFTH NATIONAL BANK OF PITTSBURGH V. PITTSBURGH AND
CASTLE SHANNON RAILROAD COMPANY.

(1 Federal Reporter, 190.)

Jurisdiction — stockholders.

The District Court of the United States has jurisdiction of a bill in equity filed by a National bank.

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Stockholders have no standing in court to interfere for the protection of their company until the board of directors of the company have neglected or refused an application to take the proper steps to protect the interests of the company.

(District Court, Western District of Pennsylvania.)

THE Fifth National Bank of Pittsburgh filed a bill in equity in the District Court of the United States for the Western District of Pennsylvania against the Pittsburgh and Castle Shannon Railroad Company, and George R. Duncan, trustee for the bondholders of the company, alleging that it was a creditor, a bondholder and a stockholder in defendant company, and that the road was insolvent and praying for the appointment of a receiver for the protection of its interests in defendants' company. Upon the — day of April, 1879, the court, upon motion of the plaintiff, appointed W. W. Martin receiver of defendant company.

Upon February 12, 1880, certain stockholders, alleging that they were acting for a majority of the stockholders of defendant company, presented a petition to the court and moved: 1st. To dismiss the bill for want of jurisdiction; or if this was refused, 2d. To dismiss the bill for want of cause of action; or if this was refused, 3d. To permit the petitioners to file an answer in the name of defendant company; or if this was refused, 4th. To remove the present receiver and appoint James M. Bailey in his stead. The court was also asked in the same motion to restrain The Iron City National Bank from proceeding on a judgment obtained by it against defendant company, and to restrain H. Sellers McKee from proceeding further upon a suit brought by him against defendant company, in which judgment had not yet been obtained. Each of these creditors had previously obtained the permission of the court to bring their suits.

An answer was filed by H. Sellers McKee denying the allegations in the petition affecting him, and after argument the court permitted him to enter judgment.

In February, 1880, a motion was made by the counsel of defendant company to quash the petition for the following reasons:

1st. That the said petition is informal, irregular and defective,

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and not in accordance with the equity rules and practice of this honorable court.

2d. That the said petitioners were not parties to the litigation and are not in this manner entitled to make this application and motion to dismiss the bill as prayed for in their petition.

3d. That the said petition nowhere sets forth that the board of directors, to whom is committed the management of the road, have failed or refused, on application by the stockholders, to take proper efforts to secure the interests of the said stockholders.

4th. That the said petition shows on its face that there is in existence a regularly elected board of directors, having, under the charter of the company, the control and direction of its franchises and property.

5th. That the said petition is multifarious in this,

(1) That it prays to dismiss the bill of complaint in this case filed by the Fifth National Bank.

(2) That it prays to dismiss the receiver.

(3) That it prays to appoint James M. Bailey receiver.

(4) That it prays to enjoin the Iron City National Bank, a person not a party to the litigation.

(5) That it prays to enjoin Sellers McKee, a person not a party to the litigation.

(6) That on the face of said petition it shows that the petitioners are not entitled to any of the remedies therein asked, in the manner as prayed.

7th. That said petition in so far as it prays to dismiss the bill in this case filed is fatally defective both as to parties and form.

This motion the court ordered to stand over until the hearing on the petition and answers.

Answers were filed by the receiver and by the president of the defendant company denying the allegations of the petition.

Considerable testimony was taken, under the order (upon the part of petitioners) of the court, and after argument, the court dismissed the petition.

S. Schoyer, Jr., for petitioner.

D. T. Watson and Knox & Reed, for receiver and defendant.

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Hampton & Dalsell, for H. Sellers McKee.*Slagle & Wiley*, for Iron City National Bank.

ACHESON, D. J. The parties to this suit are the Fifth National Bank of Pittsburgh, plaintiff, and the Pittsburgh and Castle Shannon Railroad Company and George R. Duncan, trustee of certain mortgage bondholders, defendants.

Certain stockholders of the corporation defendant, claiming to represent a majority of the stock, filed a petition in the case, containing various prayers, only two of which are now pressed, viz.:

1. That W. W. Martin be removed from the receivership of the defendant company, and James M. Bailey appointed in his stead.

2. That the Iron City National Bank and Sellers McKee, judgment creditors of the defendant corporation, be restrained from proceeding by execution against the corporation.

At first, I was disposed to regard the petition in the light of a cross-bill; but upon a careful examination I find it lacks the essential elements of such bill. Upon the pleadings as they now stand, the petitioners are strangers to this case and have no right to relief in the manner proposed, even had they shown good ground therefor. I reach this conclusion with the less hesitation, because it appears, from the affidavits read, that the petitioners now have, in active sympathy and co-operation with them, a majority of the board of directors, and of course, have it in their power to control the corporation and be heard in court through it.

I might here stop with a simple order dismissing the petition; but the case is so peculiar that I feel called on to add some additional observations.

It was said by counsel for one of the judgment creditors that the court should itself take notice that the case is one not within the jurisdiction of the court. But I do not agree with the counsel upon the question of jurisdiction. By section 563 of the Revised Statutes the United States District Courts have jurisdiction (*inter alia*) "of all suits by or against any association established under any law providing for National banking associations within the district within which the court is held."

But while of opinion that the controversy is within the jurisdic-

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tion of this court, I am very sure a receiver of the defendant corporation would never have been appointed had the court been in possession of all the facts which have been developed upon the present hearing. It is now plain that the rights of the plaintiff were not of such a character and were not in such jeopardy as to call for a remedy so extraordinary as the appointment of a receiver. Had any opposition been made by the defendants, clearly the court would have refused such appointment. In fact, it now for the first time appears, that the corporation defendant acquiesced in, if it did not strictly promote, the appointment of a receiver in its own interests. This was not apparent to the court when the appointment was made.

At that time there was a contest for the office of receivership between the stockholders, some favoring Mr. Martin, others Mr. Bailey. The former was appointed. I do not find he has been guilty of any act of commission or omission since his appointment calling for his removal for cause.

No one having a proper standing in court has asked the court to rescind the order appointing a receiver, and I do not think the court of its own motion is called upon to make such order.

But creditors of the corporation will no longer be hindered in bringing suits or proceeding by execution against it. Leave will be and is hereby granted to them to proceed by suit and execution.

This permission, however, is subject to a qualification in the case of M. B. Thompson, Jane Reamer, Minerva H. Rahausser, Jane Redman and Margaret Reamer. These parties proceeded in the Common Pleas Court No. 2 against the Pittsburgh and Castle Shannon Railroad Company and the receiver by an action of ejectment in clear contempt of the authority of this court. A subsequent application was made to this court to sustain that suit, but this was refused. I have been asked to reconsider the action of the court in this regard, and I was at first disposed to do so. But upon reflection, I have concluded not to disturb the former order of the court. But leave is now granted said parties to bring and prosecute to judgment and execution a new action of ejectment or such other suits as may be appropriate to their case.

And now, to wit, February 18, 1880, it is ordered that the petition of said stockholders be dismissed.

Seligman v. Charlottesville National Bank.

SELIGMAN V. CHARLOTTESVILLE NATIONAL BANK.

(3 Hughes, 647.)

Lending of credit by guaranty.

A National bank, upon the deposit of collateral security with it, has no power to guarantee the obligation of the person making such deposit.

(Circuit Court, Western District of Virginia.)

THE opinion states the facts.

BOND, J. The declaration in this cause sets out that J. & W. Seligman & Co., of New York, are bankers; that on the 14th day of May, 1875, B. C. Flanagan & Son made a proposition to the Charlottesville National Bank, in writing, to this effect: In consideration of the guaranty of a letter of credit to the extent say of five thousand pounds sterling, to be issued by J. & W. Seligman & Co., of New York, we propose to deposit with the Charlottesville National Bank, business paper to the extent of \$35,000. For such amounts of said letter of credit as we may use we propose the bank shall discount of said paper, at nine per cent, a sufficient amount to cover the amount used by us, holding the balance as collateral security for same; the bank to receive the money under the letter of credit which is used in the discount aforesaid. It is further agreed that we will take the risk as to any fluctuations in gold, so that the difference in rate of interest between that charged us and that paid by the bank shall not be less than at the rate of two per cent per annum in favor of the bank, the bank having the benefit of any fluctuations which may increase their profit.

The proposition was accepted by the bank by the following resolution of its board :

" *Resolved*, That the president and cashier be and they are hereby authorized, in accordance with the proposition submitted by B. C. Flanagan & Son, to guarantee to Messrs. J. & W. Seligman & Co., drafts drawn under their letter of credit in favor of B. C. Flanagan & Son to the extent of £5,000, on the deposit with the bank of business paper, by Flanagan & Son, as collateral security to the extent of \$35,000."

Seligman v. Charlottesville National Bank.

The plaintiffs aver that in consideration of this acceptance of Flanagan & Son's proposition by the bank, they gave to Flanagan & Son a letter of credit for £5,000, as follows:

"No. 1,023.

NEW YORK, May 25, 1875.

"Messrs. SELIGMAN BROS., *London* :

"SIRS — We herewith beg to open with you a credit in favor of Messrs. B. C. Flanagan & Son, of Charlottesville, Va., for £5,000, of which they will avail themselves of, either in their own drafts or the drafts of such parties as they may accredit with you, at four months after sight. You will please honor said drafts to the above amount, advising us promptly of maturity.

J. & W. SELIGMAN & Co."

Flanagan & Son deposited the \$35,000 business paper with the bank, and the bank gave its written guarantee to Messrs. J. & W. Seligman & Co., as follows:

"In consideration of one dollar, to us in hand paid, the receipt of which is hereby acknowledged, we guarantee to Messrs. J. & W. Seligman & Co. the prompt and punctual payment of all sums and amounts due them under their letter of credit No. 1,023, for five thousand pounds sterling, on the part of Messrs. Flanagan & Son, and we hereby hold ourselves liable for the prompt and complete payment of all amounts that may so become due to them, and for the exact fulfillment of all the conditions mentioned in the annexed receipt:

"NEW YORK, May 25, 1875.

"Bills receivable amounting to \$35,089 16-100 have been deposited with the Charlottesville National Bank by B. C. Flanagan & Son, as collateral security for the within-mentioned credit, in accordance with the resolution of the board of directors adopted in full board on 14th May, 1875."

Which guarantee and receipt are signed by the president and cashier of the bank. And the declaration further shows that Flanagan & Son gave plaintiffs the following receipt:

"NEW YORK, May 25, '75.

"GENTLEMEN — We have received to-day your letter of credit for £5,000 on London in our favor, dated to-day, and in consideration thereof we hereby agree that whenever advised of a draft having been drawn under said credit we will accept your draft, or reimburse you upon your notifying us of the date when due, for the amount of said bills, payable in New York, twenty-one days before the maturity of the bill in London, or their equivalent in cash. We will allow you two per cent banker's commission on the amount of drafts made under the above credit, together with bill stamps, postage, etc., and deposit with you the following collaterals, which we authorize you to dispose of at your discretion in the event of our non-compliance with the above terms.

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"We further authorize you to cancel this letter of credit at any time to the extent it shall not have been acted upon when notice of revocation is received by the user.
B. C. FLANAGAN & SON."

Drafts were drawn against the letter of credit, in accordance with the agreement, which were ultimately paid by plaintiffs, Flanagan having failed to accept and pay the twenty-one day drafts spoken of in the receipt. The bank failed and was placed in the hands of a receiver by the Comptroller of the Currency, and the plaintiffs allege that it is liable upon its above written guarantee for the amount of Flanagan & Son's draft remaining unpaid and held by them.

To this declaration there is a demurrer; all errors in pleading are waived, and the question presented is, whether, upon the facts above set forth, the plaintiffs are entitled to recover.

The case is free from many difficulties that have arisen in like cases. It is not a contest against the corporation itself, pleading a want of power to make a contract from which it has derived no benefit, but which caused loss to others, such a defense having been justly held by many courts to be as odious as the plea of the statute of limitations on the part of an individual debtor; but it is a contest between creditors claiming the same fund, where each party has the just right to contest the claim of the other in every legal manner.

Nor is there any question of notice to parties, upon which many decisions in other bank cases depend. Here the transaction is in writing chiefly, and stands between the original parties to-day as it did the day it was made. Under these circumstances we are to determine whether or not a National bank is authorized by the statute creating it to guarantee the paper of a customer for his accommodation; for this is the real transaction set forth in the declaration. We will admit for the sake of the argument what plaintiffs' counsel have urged at bar, that a bank may borrow money to aid its customers; but here the bank got no money; none of the money procured by the letter of credit was to go to it. All the bank had to expect was the profit it was to make from the discount it receives from the collaterals placed in its

hands, to secure it from loss by reason of the pledge of its credit to plaintiffs.

The Flanagans were to give their own drafts to take up those drawn against the letter. They agreed what commission the plaintiffs were to charge. The bank had nothing to do with the transaction, except to see, in the event of the failure of the Flanagans, that the plaintiffs were secure against loss.

What a National bank is authorized to do is defined by the statute, of which it is the creature. The section of the statute applicable here is 5136 of the Revised Statutes. By that section it is authorized to exercise all such powers as are incidental to banking, by discounting and negotiating promissory notes, bills of exchange, and other evidences of debt. But certainly there is no discounting of promissory notes set forth in the declaration.

The cause of action is the written guarantee of the bank. To discount a note is to deduct the interest *in presenti* and pay over in money the face value of the note, less the amount deducted, to the holder. Here the bank parted with no money. To negotiate a promissory note is either to buy or sell it; and so with a bill of exchange. Here the bank neither bought nor sold any bills of exchange. It agreed to guarantee Flanagan's purchase of them from plaintiffs. By the same section the bank is allowed to lend money upon personal security; but it must be money that it loans, not its credit. Upon the deposit of the collaterals with the defendant by Flanagan, it loaned its credit to him to be used with plaintiffs.

It is alleged, however, that the bank, by reason of the powers granted to it, incidental to banking, could enter into this contract. But the incidental powers given are not the incidental powers given generally to all banking institutions; but only such as are incidental to banks allowed to do such things as are prescribed by the statute — such acts as are incidental to discounting and negotiating promissory notes and bills of exchange and the loan of money on personal security, and the other acts of banking mentioned in the statute. We cannot see how this transaction can be brought within the powers of the bank granted by statute, and the demurrer must be sustained.

Johnston v. Charlottesville National Bank.

JOHNSTON V. CHARLOTTESVILLE NATIONAL BANK.

(3 Hughes, 657.)

Lending credit.

Where a party knowingly takes as collateral security drafts of a National bank, drawn for the accommodation of a customer, he cannot recover in a suit against the bank in the hands of a receiver.

(Circuit Court, Western District of Virginia.)

THE opinion states the facts.

BOND, J. This cause having been submitted to the court by writing, duly executed and filed, waiving the intervention of a jury, as well upon the facts as upon the law, and having been argued by counsel, the court doth find the facts to be as follows:

Johnson Brothers & Co., the plaintiffs, claim to recover against the defendant, the Charlottesville National Bank, upon five bills of exchange in their declaration mentioned. The partners constituting the firm of Johnson Brothers & Co. are citizens of the State of Maryland, and are bankers in the city of Baltimore.

The defendant bank was, on the 16th of April, 1875, a banking association and body corporate, carrying on the business of banking at Charlottesville, in the State of Virginia, under the provisions of the act of Congress known as the National Bank Act. N. H. Massie was a director and president of the defendant bank. B. C. Flanagan, of the firm of B. C. Flanagan & Son, was also a director, and W. W. Flanagan, also of that firm, was a director and cashier of the bank. Each continued his official relations to the bank until its failure, which occurred about the 28th of October, 1875, when the bank went into the hands of a receiver, in whose hands it now remains.

Prior to the 13th day of April, 1875, the bank had, at sundry times, discounted paper for the Flanagans to an amount aggregating more than \$50,000, which paper at the date first above mentioned had not matured, but much of this paper had been re-discounted for the use of the Bank of Charlottesville by other banks in

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New York and Baltimore. Flanagan & Son were in straitened circumstances on the 13th day of April, 1875, and though in possession of sundry and numerous bills receivable, they were drawn payable upon such long time that they were available only as collaterals and not for the purpose of present discount in bank. They also had certain bonds designated as Jordan Alum Springs bonds. The Flanagans applied to the defendant bank for a loan of \$25,000, but the bank declined to make such a loan, because it was out of funds to do so. On the 13th of April, 1875, Flanagan & Son applied to the plaintiffs for a loan of \$25,000, stating they might have got it from the defendant bank, but it was not in funds. The plaintiffs required them to submit their proposition in writing, which they did in the words following :

" We propose to borrow \$25,000 until next fall, say November 20, and to pledge as collateral for same, say \$30,000 bills receivable, \$25,000 Jordan Alum Springs ten per cent bonds. The bills receivable above are given to us for guano and provisions furnished merchants by us, and in many cases are secured to us by a pledge as collateral of planter liens, and indorsed by Flanagan, Abell & Co. The Springs bond are secured by a first mortgage on all the property, both real and personal. The cost of said property is \$15,000, and the amount of the mortgage is \$30,000. The bonds bear ten per cent. J. Ran. Tucker and John H. Minor are trustees, and the mortgage can be foreclosed on failure to pay interest. We will give our note for same and interest, but will wish any notes which are held as collateral, and maturing before maturity of above loan, to be credited on same, with rebate of interest. As an alternative, if preferred by you, we believe, by depositing the Springs bonds with the Charlottesville National Bank, we can give its indorsement. It is proper, however, to state, the proposition is contingent on the bank's willingness to indorse, which has not been submitted to the directors thereof."

The plaintiffs then took the written proposition under advisement, promising to give notice of its acceptance or non-acceptance in due time, and accordingly, on the 14th of April, 1875, the plaintiffs addressed to Flanagan & Son the following letter:

" BALTIMORE, April 14, 1875.

" Messrs. B. C. FLANAGAN & SON, *Charlottesville, Va.* :

" DEAR SIRs — In reply to the memorandum handed us yesterday we have to say, that we will advance you twenty thousand dollars on the following collaterals: Forty thousand dollars of bills receivable from new and fresh sales of this season (no renewals of old paper to be included), and four drafts of five thousand dollars each of the Charlottesville National Bank, on the

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Citizens' National Bank of this city, payable on the 30th of November next, 'acceptance waived,' said drafts to be received by us in lieu of the Jordan Alum Springs bonds, which are to be deposited by you with the bank as security for these drafts as above. You forgot to mention in your memorandum the rate of interest and commissions you are willing to pay. If this be made satisfactory we will make the advance as herein stated. Perhaps you had better come down in person to conclude the arrangement.

Respectfully,

JOHNSTON BROTHERS & Co."

Upon receipt of this letter, on the 16th day of April, 1875, B. C. Flanagan requested Massie, the president of the Charlottesville Bank, to sign and issue the drafts that they might use them as collateral security, in part, for the loan from plaintiffs, with which request, Massie, the president, on the 16th of April, 1875, complied, without submitting the matter at any time to the board of directors of the bank; but he required that Flanagan & Son should submit to him a written proposition for the loan, which they did in the following words:

"To N. H. MASSIE, *President Charlottesville National Bank* :

"We are greatly in want of certain accommodations to extend some liabilities of our firm until next autumn, and if we can procure them through the aid of this bank will be enabled then to meet them without, we are persuaded, any doubt; and are able to cover the amount by collateral security in the shape of good business paper not maturing early enough for our present purposes, but of unquestionable solvency and reliability. It is, of course, not worth our while to say to you that our liability in many different ways to the bank, incurred through a course of years in the two banks before their consolidation, partly as principal and partly as indorser, we being ourselves, individually, the owner of a very large part of the stocks of both banks, is of such an amount that even the most temporary disaster to us would seriously inconvenience the present bank, even to use no stronger language. What we ask now is aid to the extent of five drafts extending till November, amounting in the aggregate to twenty-five thousand dollars."

Having obtained the bills of exchange, Flanagan & Son, on the 17th of April, called on the plaintiffs at Baltimore, and obtained from them the loan of \$25,000, giving the plaintiffs their promissory note, payable on the 30th of November then next, for the amount of the loan, and interest added, at the rate of eighteen per centum per annum, amounting to the sum of \$27,912.50; and, as collateral security, indorsed and delivered to the plaintiffs said five bills of exchange, and transferred bills re-

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ceivable to the amount of \$26,106.24, which last amount they increased to \$46,000 in a month thereafter.

The plaintiffs were aware at the time they received them that at the time of drawing those bills the bank had no funds with which to make discounts, and that however obtained from Massie, they were to be used by Flanagan & Son as collateral security for the loan made by them.

The plaintiffs were not aware of the arrangements made with Massie by Flanagan & Son to obtain the five bills, except so far as is above stated, and by the correspondence between Flanagan and the plaintiffs, and in the application of the 13th of April, 1875, made by Flanagan & Son for a loan.

On the 16th day of April, 1875, the Citizens' National Bank of Baltimore, upon which the five drafts were drawn, was, and had been, the correspondent bank and reserve redemption agent of the Charlottesville National Bank, keeping two accounts with it: one general account as its correspondent, and another account exclusively pertaining to its redemption agency and the reserve fund of the Charlottesville Bank remaining in the Citizens' Bank. On the 16th of April, the date of the drafts, there was to the credit of the Charlottesville Bank in the Citizens' Bank, on its reserve account, a balance of \$15,000, but at the same time the Charlottesville Bank owed the Citizens' Bank, upon general account, \$14,088.84, which indebtedness was increased on the 17th of April, 1873, to \$15,337.35; the reserve account remaining as it was.

The bills of exchange were drawn by the Bank of Charlottesville on the Citizens' National Bank of Baltimore, each payable to the order of B. C. Flanagan & Son; the first payable on the 20th of November "fixed;" the second and third were drawn payable on the 25th and 30th days of November "fixed;" and the fourth and fifth were drawn payable on the 6th and 10th days of December "fixed;" and each of said bills was drawn and expressed "acceptance waived."

The word "fixed" in said bills means without grace. Neither of the bills was paid at maturity though presented, and due notice of protest was sent to drawer and indorser. When the money

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was obtained from the plaintiffs by the Flanagans, it was deposited in the Bank of Charlottesville subject to the order of Flanagan & Son. Neither of said bills was drawn against money actually on deposit to the credit of the Bank of Charlottesville in the Citizens' Bank, nor upon any money thereafter to become due from the Citizens' Bank to the Bank of Charlottesville, upon the maturity of said bills. It was expected by the plaintiffs, and the Charlottesville Bank and Flanagan & Son, that the latter would protect the drawer from any liability upon the bill, by paying their note given to the plaintiffs, as above stated, when the same matured.

And the court finds, further, that it is not in the ordinary course of business, or usual with National banks, to draw time bills of exchange upon each other, without grace, acceptance waived.

And the court finds as matter of law, that upon these facts the issuing of the bills of exchange in question was not a discount, because the Bank of Charlottesville had no funds with which to discount paper presented for discount; but that it was merely a loan of the bank's credit to Flanagan & Son. And it further finds that the plaintiffs, knowing the said drafts or bills of exchange were issued to the Flanagan, as collateral security, and that they were drawn for that purpose, it makes no difference whether the same were given to Flanagan & Son for a note deposited by them with the bank at the time, secured by the collateral security or not; the said drafts were but the accommodation paper of the Bank of Charlottesville, and as such were void in the hands of the plaintiffs, who took them with such knowledge of their character.

And the judgment is given for the defendant with his cost.

Price, Receiver of Venango National Bank, v. Yates.

PRICE, Receiver of Venango National Bank, v. YATES.

(19 Albany Law Journal, 295.)

Compositions by receiver — liability of shareholders — statute of limitation.

A court has no power, under section 5324, U. S. Rev. Stats., to order the receiver of a National bank to compound debts which are not "bad or doubtful;" and a composition under such an order of debts not "bad or doubtful," as the debt of a shareholder arising on his subscription to the stock, is ineffectual.

Where the State and the Federal courts have concurrent jurisdiction, a State statute of limitation may be pleaded as effectively in a Federal court as it could be in a State court; and in such cases the Federal courts will follow the decisions of the local State tribunals and will administer the same justice which the State courts would administer between the same parties.

In an action by the receiver of a National bank to enforce the liability of a shareholder, it appeared that the date of the defendant's subscription to the stock was prior to May, 1866, when the receiver was appointed; that the Comptroller of the Currency decided on the 28th of June, 1876, that the enforcement of this liability to its full extent was necessary, and instructed the receiver accordingly, and that this action was thereupon brought. *Held*, that although such decision and order of the Comptroller were necessary preliminaries to a suit against the shareholder; yet, having been delayed without sufficient apparent reason for more than six years from the date of the subscription, the statute of limitation was a bar to the action — the State courts having decided that an act necessarily preliminary to the commencement of a suit upon a contract must be done within six years, unless sufficient reason for the delay is shown

(Circuit Court, Western District of Pennsylvania.)

ACTION by the receiver of a National bank against a shareholder to enforce his liability.

MCKENNAN, J. Two questions were reserved at the trial of the case, and a verdict was taken for the plaintiff subject to the opinion of the court upon these questions:

1. The first question involves the effect of an order of the Court of Common Pleas of Venango county, Pennsylvania, for the composition of the claim now in suit.

In 1867 suit was brought in that court by the receiver of the Venango National Bank against the present defendant to enforce

his personal liability as a stockholder in that bank, which is also the subject of the present suit. On the 23d of March, 1869, with the assent and concurrence of Judge Derrickson, then acting as the representative of the Comptroller of the Currency, and as the counsel of the receiver, the receiver made a written application to the court for an order to adjust and settle the suit by the payment of twenty-five dollars by the defendant, whereupon an order was made by the court that "the receiver may settle and compound the said suit and the claim involved therein on the terms prayed for in the proposition." The sum offered was afterward paid to the receiver. The order of the court was made in the exercise of authority supposed to be given to it by the 5234th section of the Revised Statutes, and without an order of the court, which it was competent to make, the composition could have no effect. By a separate classification in the act of Congress of the subject of the suit, as well as by the import of the terms of the act, the contested claim is excluded from the category of "bad or doubtful debts," which alone the court is authorized to order the receiver to "sell or compound," and hence the alleged composition was ineffectual for want of power in the court to direct or sanction it.

2. Is this suit barred by delay in the institution of it?

It is brought to enforce the personal liability of a shareholder in a National banking association. This liability is clearly contracted. By his stock subscription the shareholder stipulates to pay an additional sum equal to the par value of the shares subscribed for by him, to discharge the debts of the association, when he is legally called upon to do so. The obligation to pay is assumed when the subscription is made, and proof of subscription is plenary evidence of the whole of the shareholder's enjoyment, and of his consequent individual liability. This liability then accrues at the date of the subscription, but is not enforceable until needed to meet the debts of the association, and the Comptroller has so decided and instructed the receiver. Hence it has been held, that this action of the Comptroller is an essential preliminary to a suit against a shareholder. *Kennedy v. Gibson*, 8 Wall. 498. A right of action upon the contract does not there-

fore accrue until the Comptroller has acted; and by the terms of the General Currency Act, all suits by or against a receiver are alike cognizable by the State and Federal courts. Where there is this concurrence of jurisdiction a State statute of limitation may be pleaded as effectively in a Federal court as it could be in a State court; and in such case the Federal courts will follow the decisions of the local State tribunals, and will administer the same justice which the State courts would administer between the same parties.

The Supreme Court of Pennsylvania has repeatedly recognized the general rule, that an act necessarily preliminary to the commencement of a suit upon a contract must be done within six years to avert the bar of the statute, unless sufficient reason for the delay is shown. In *Laforge v. Jayne*, 9 Barr. 410, it was applied, the court saying, "It was ruled in the case of *Codman v. Rogers*, 10 Pick. 112, that although an action will not lie in some cases without a previous demand, and that in such cases the statute did not run until demand, nevertheless the demand ought to be made in a reasonable time, and when no cause for the delay is shown it ought to be made within the time limited by the statute for bringing the action." The same doctrine was reaffirmed and decisively applied in the *Pittsburgh and Connellsville R. R. Co. v. Byers*, 8 Casey, 22, and in the *Pittsburgh & Connellsville R. R. Co. v. Graham*, 12 id. 79.

The application of this principle in this case is peculiarly appropriate. The date of the defendant's subscription, when his alleged indebtedness accrued does not appear, but it existed before the 5th day of May, 1866, when the receiver was appointed. Nothing was done to authorize a legal demand upon the defendant to respond to his individual liability, until the 28th day of June, 1876, when the Comptroller decided that the enforcement of this liability to its full limit was necessary, and instructed the receiver accordingly. This suit was shortly afterward brought. Not only six but more than ten years from the date of the defendant's enjoyment, was permitted to elapse before the essential conditions precedent to a legal call upon him to pay were performed. The delay seems to have been purely arbitrary—at

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least it is unexplained — and hence the strongest considerations of justice, and the obvious policy of the act of Congress demand that the defendant should not be vexed with litigation, touching a claim which has about it such an odor of staleness.

Let judgment be rendered for the defendant, *non obstante veredicto*.

NEW ORLEANS BANKING ASSOCIATION V. ADAMS.

(3 Woods, 21.)

Jurisdiction.

A proceeding against a National bank for the cancellation of a mortgage may be brought in a parish of Louisiana where the bank is not situated. Section 5198 of the National Bank Act does not exclude other forums than those specified, and relates only to actions to recover usurious interest.

(Circuit Court, District of Louisiana, 1876.)

BILL for relief against a judgment for the cancellation of a mortgage owned by a National bank. The opinion states the point.

J. D. Rouse and Wm. Grant, for complainant.

J. P. Hornor, W. S. Benedict, F. W. Baker, Clay Knoblock, Thos. Allen Clarke, T. S. Bayne and Henry Renshaw, Jr., for defendant.

BILLINGS, Dist. Judge. It is urged, in the first place, that the court which rendered this judgment had no jurisdiction; that the complainant could not be sued or proceeded against in a court holding its sessions in the parish of Lafouche, first, by reason of the United States statute which provides, by way of amendment to section 5198, "that suits, actions and proceedings against any association under this title, may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established; or in any State, county or municipal court in the county or city wherein the association is located, having jurisdiction in similar cases." Section

New Orleans Banking Association v. Adams.

5198, to which this clause is amendatory, provides that actions might be brought against National banks, to recover twice the amount of usurious interest. These are the only cases, so far as I can discover, which are expressly authorized by the title 52 with reference to National banks. This amendment does not exclude other forums, and relates only to actions expressly authorized by that title, and this action is not one of them.

[Omitting other points.]

CASES DECIDED

IN THE

COURTS OF THE SEVERAL STATES.

PICKETT v. MERCHANTS' NATIONAL BANK OF MEMPHIS.

(38 Ark 340.)

Usury — jurisdiction — limitation — extent of forfeiture.

State courts have jurisdiction of questions arising under the National Banking Act.

The knowingly taking or receiving, by a National bank, of a greater rate of interest than is lawful in the State where it is located, is usurious under the National Banking Act, and the entire interest is forfeited, and the usury is not purged by settlements and renewal notes without additional usury.

The limitation of two years in the National Banking Act, for the recovery of forfeitures for usury, does not apply to the defense of usury.

THE opinion states the case.

Gideon J. Pillow, for Mrs. Pickett.

Henry G. Smith, for Merchants' National Bank.

Charles W. Adams, for Wormley.

Harry Hill & Walker, for Ussery.

WALKER, J. On the 1st day of March, 1873, the Merchants' National Bank of Memphis, Tenn., filed a bill in the Chancery Court of the county of Mississippi, to subject a tract of land there situate, containing about 3,000 acres, known as the Nodina Place,

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to the payment of debts due and owing the bank, by the firms of Wormley, Joy & Co., and Wormley, Pickett & Co., under a deed of trust, executed by Saffarans, to Smith, as trustee, to be sold upon the non-payment of the debts upon the terms in said deed specified.

[Omitting immaterial statements.]

It appears from the evidence that for some time prior to the 4th of February, 1868, the firm Wormley, Joy & Co., of whom Pickett, Wormley and Ussery were members, had opened a bank account with the Merchants' National Bank of Memphis, with whom they had a running account for moneys loaned and checks paid, and credits for deposits and payments.

The bank made a monthly statement of accounts, and struck the balance due each month, which was carried forward and charged against the firm with 12 per cent interest; and finally on the 4th day of February, 1868, the firm was found to be owing the bank \$19,353.48, for the payment of which four notes of that date were executed, each for the sum of \$4,838.37.

Counsel for the bank contend, that these notes were executed for the sum found to be due upon final settlement, purged of usurious interest, by payment at the time the monthly accounts were rendered, which, in fact, constituted so many distinct settlements. True, there is evidence that the accounts were stated monthly, and a balance struck, but whether the usurious interest was or not paid, is not shown; nor can we, upon a fair consideration of the transaction between the parties, admit these monthly estimates to be separate and distinct settlements, or indeed settlements at all, but intended to show how the accounts stood between the parties. It was in fact a running account between the bank and its customer, Wormley, Joy & Co., commenced in 1866, and continued to 1868, the time when the accounts were closed by note, and in fact constituted but one transaction.

So held under like circumstances by the Supreme Court of Tennessee, in the cases of *Weatherhead v. Boyers*, 7 Yerg. 545, and *Boyers v. Boddie*, 3 Humph. 666. In the first-mentioned case Mr. Justice PECK said: "The transaction was a continued one, new dealings, new advances, new securities for money, * * *

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when taken, make a case where neither time nor the statute of limitation can have effect." The defense was usury, the precise question, as to the time when the statute bar commenced, the transaction of advancements, payments and settlements, extended for several years and was held to be one transaction.

In the case reported in 3d Humph.: The question arose out of a usurious transaction, consisting of a series of settlements, payments and securities, from 1823 to 1840, and was held by the court to be one usurious transaction. Mr. Justice REESE said: "As a court of chancery we cannot but see that all of these notes, all of these payments and renewals, incorporate themselves into one continuing contract and transaction."

Under this state of case, the question presented is, was this an usurious transaction; section 5198, Revised Statutes of United States, provides "that the taking, receiving, reserving, or charging a rate of interest greater than is allowed by the State where the bank is located, when knowingly done, shall be a forfeiture of the entire interest, which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." Six per cent interest is that allowed by the statute of Tennessee.

It is contended for the bank, that conceding a greater amount of interest to have been charged than was permissible, it was not carried into the note, but was taken and paid in the monthly accounts, and the notes executed were for a balance of debt actually due, purged of usurious interest.

In support of this position we have been referred to several decisions of courts of high authority, which assert the general proposition, that if usurious interest is in fact paid, and notes taken for valid consideration, not tainted with usury, a plea of usury could not be sustained; but in the case before us the evidence failed to make such a case as those reported. It is true that a monthly account was taken of the debts and credits between the parties, and a balance struck, but whether the deposits made with the bank were in fact applied to the payment of usurious interest, or as a general credit, is not shown. The rule with regard to the application of credits is most frequently governed by statute; a credit in this State, unless otherwise directed,

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goes first to the payment of interest; in others, as in Louisiana, to the extinguishment of the most onerous debts; perhaps, in others, to be applied (in the absence of special instruction), at the discretion of the creditor; but whether the one or the other, unless by special direction, we think the payment should be applied to the liquidation of lawful interest, and not to such as the creditor could interpose a valid defense to.

The usurious interest in this instance, having been carried into the general account, and made part of the sum found due upon final settlement, taints the whole contract with usury; the fact that the account was closed by note amounts to nothing; it matters not whether the usury was charged and taken by any tacit assent of the firm by the bank in stating the monthly account, or by note substituted for the one first given; the question is not how the contract was closed, or renewed, but whether any part of the sum charged, and for which the note was executed, was for the use or forbearance of money at a greater rate of interest than allowed by law to be taken. Such is clearly the rule as laid down by the elementary writers, and accords with numerous decisions, to some of which we will refer.

In *Tuthill v. Davis*, 20 Johns. 285, the Supreme Court of New York says: "As it appears that the note now in question was given to renew one taken up, the former usurious note then in the hands of the plaintiff, the original party to the usurious contract, without new consideration, but including the extortionate interest of the original loan, this last note is equally infected and of the same illegitimate progeny as the first notes."

In *Read v. Smith*, 9 Cow. 647, the court says: "The note upon which the suit was brought is a continuance of the original note. * * * If that note was given upon an usurious consideration, the taint which it imbibed attached to each of the securities subsequently taken, and affects and destroys the one in question."

In *Thomas v. Catheral*, 5 Gill. & Johns. 25, the Supreme Court of Maryland says: "If the note was made and indorsed in execution of a usurious agreement, it was tainted with usury."

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In *Holden v. Cosgrove*, 12 Gray, 217, it was held that the same defense may be made to a renewal as to the original notes.

[Omitting an immaterial point.]

Without questioning the correctness of the decisions cited by counsel, which deny to the debtor the right to interpose the personal defense of usury, when the debtor has parted with his interest in the debt, making a contract for its payment in ordinary cases, we think that the facts before us, in this case, make it clearly an exception. In order to the better understanding of which we should keep in mind the fact that this is not a suit to recover money paid upon a usurious contract, nor to enjoin the payment of money, for the payment of which a judgment has been rendered; but it is interposed as a defense against the recovery of usurious interest; making a much stronger case than many in which the plea has been sustained.

To several of which we will refer: In *Tiffany v. Boatman's Institution*, 18 Wall. 375. One Darby borrowed from the institution at usurious interest, a sum of money, became involved in debt, and upon petition was adjudged a bankrupt. Tiffany was appointed trustee, and filed a bill against the Boatman's Institute to recover money which Darby had paid upon such usurious transaction. The complaint was for more than the usurious interest paid.

Upon this state of case Mr. Justice DAVIS, who delivered the opinion of the court, said: "If more than legal interest is taken, and suit is brought to enforce the contract, and the plea of usury is interposed, the whole interest is forfeited. * * * The debtor is not released from his obligation to pay, but the interest is diverted from the parties to school purposes. If however the borrower suffers judgment to go against him without pleading usury, or if, without suit, he pays the usurious interest, he cannot, either at law or in equity, maintain an action for its repayment. * * * But it does not follow in cases of usury, if the contract be executed, that a court of chancery, on application of the debtor, will assist him in recovering back the principal and interest; to do this would be to aid one party to an illegal transaction, and deny redress to another. Courts of equity have a discretion

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on this subject, and have prescribed the terms on which their powers can be brought into activity; they will give no relief to the borrower if the contract is executory, except on the condition that he pay to the lender the money lent with legal interest; nor if the contract be executed, will they enable him to recover more than the excess he has paid over the legal interest."

If such is the rule, when the contract of usury is executed by the payment of money usuriously exacted, with still greater force it should be applied where nothing has been paid, and when the debtor is called upon to answer in a court of equity, what amount he should be required to pay, and to what extent it should become a charge upon the trust fund.

The debtors do not, in this instance, seek to recover back money which has been paid, nor do they ask to have returned to them the money which they borrowed; nor the legal interest which has accrued, but only that the debt be purged of the usurious interest charged against them; such being the case, it comes within the rule recognized by Judge Davis, when he says: "Courts of equity have a discretion on the subject, and have prescribed the terms on which the power can be brought into activity."

Why, in good conscience, should the rule not be applied in this case? That these defendants contracted with Saffarans to pay this debt does not make it the less usurious or iniquitous on that account. The bank is not asked to abate one cent of the principal or legal interest; it gets it all, and under the state of the pleadings has its debt preferred for payment over the debts of these defendants.

Limited in its extent and purpose, as we have indicated, we think the defense of usury properly interposed. In thus holding, we do but affirm our previous decision. *Ruddell v. Ambler*, 18 Ark. 369.

It is contended by counsel that conceding the defense of usury to be good, if interposed within two years, as such was not the case, the action, or, more properly, the defense, was barred by limitation. Section 5198, Revised Statutes of the United States, provides that "The knowingly receiving, reserving or charging

a rate of interest greater than that fixed by the laws of the State or Territory in which the bank is located shall be held and adjudged a forfeiture of the interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon," and if a greater amount of interest has been paid than is lawful, twice the amount so paid may be recovered back. "Provided, suit be brought within two years from the time the usurious transaction occurred."

It will be seen that the *first* clauses give the right to defend against the recovery of interest; the *second* the right to sue for and recover money which has been paid on such usurious contract, provided, etc.

We think the limitation relates, exclusively, to actions brought to recover money paid, and not to a defense against a recovery; because, if intended to apply to the defense against usury, it would give to the party holding a usurious contract the advantage of cutting off the defense by postponing his suit until after the two years had expired.

If we do not mistake the position of counsel for the bank, they question the right of the State courts to determine this question of usury, because the defense is set up under an act of Congress, to a violation of which a penalty is imposed, and of which the courts of the United States, alone, have jurisdiction.

We do not understand the decisions referred to as sustaining this position; they do hold, however, that when suit is brought in a State court, to avoid the usurious interest prohibited by the act of Congress, the act of Congress, and not the statutes of the State in which the suit is brought, must be interposed.

Thus, in the case of *First National Bank of Whitehall v. Lamb*, 57 Barb. 429, it was held that the statutes of New York, against usury, do not apply to loans made by a National bank. See, also, 64 Penn. 563. The jurisdiction of the State courts to try the case is not questioned in either of these, or any other case.

[Omitting other questions.]

WOODWARD v. ELLSWORTH.

(4 Colo. 580.)

Tax-receiver.

A tax levied on the property of a National bank subsequent to its insolvency is subordinate to the rights of a receiver appointed after such levy.

ACTION by the receiver of a National bank to restrain a county treasurer from disposing of personal property of the bank, to satisfy a tax levied subsequently to its insolvency. The plaintiff had judgment below.

L. C. Rockwell and W. T. Hughes, for appellant.

Butler, Wright & King, and Ed. O. Wolcott, for appellee.

THATCHER, C. J. It is alleged in the complaint, and admitted by the demurrer, that the First National Bank of Georgetown, organized under the act of Congress to provide a National currency, approved June 3, 1864, suspended business July 30th, 1877, then being insolvent; that August 18, 1877, the complainant was appointed by the Comptroller of the Currency receiver of said First National Bank; that within ten days thereafter he qualified as such receiver; that upon examination of the books and accounts of said bank the receiver found it had been insolvent for more than three years previous to its suspension; that for the year 1877 the bank was assessed for taxation upon "the sum of \$25,000 as the amount of capital used by said bank over the amount invested in United States bonds;" that the sum due for taxes on said amount was the sum of one thousand and fifteen dollars; that at the time of the suspension of the bank, Cushman, who was its president, was possessed of his own right of a cabinet consisting of rare minerals and birds; that the said Cushman sold and assigned the same to the complainant for the benefit of creditors, and that he still has possession of the same as assets of the bank; that Thomas Woodward, as treasurer of Clear Creek county, was, April 16, 1878, "about to distrain and levy

upon said cabinet and sell the same for the purpose of collecting the said ten hundred and fifteen dollars claimed as taxes aforesaid." The court issued a temporary injunction restraining the defendant from seizing and selling the cabinet or other personal property then in the hands of the receiver. A motion to dissolve the injunction was made and denied. From the order denying the motion to dissolve, this appeal was taken. Whether the assessment and levy of the tax upon twenty-five thousand dollars of the capital stock of the bank were legal or illegal upon the facts set out in the complaint, we need not investigate. It is sufficient upon this question to say that even if illegal, that ground alone would not ordinarily warrant the issuance of an injunction to restrain the sale of personal property to satisfy the taxes. The statute furnishes another remedy in such cases which is complete and adequate. *Price v. Kramer*, 4 Colo. 546.

But it is upon an entirely different ground chiefly that equitable relief is sought. The circumstances of this case are peculiar. The personal property, the sale of which is restrained, was neither assessed nor levied upon. Under the statute, a perpetual lien only attaches by virtue of the levy to the specific property levied upon. General Laws, § 2337. Other property, however, may be distrained and sold, but not having been levied upon, it is not affected with the statutory lien. As therefore the tax, if legal, was merely a debt against the bank at the time the receiver was appointed, the question arises as to the status of the assets of the bank after that date.

Section 50 of the National Bank Act provides that the receiver "shall take possession of the books, records and assets of every description of such association, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order, sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the twelfth section of this act; and such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, and

also make report to the Comptroller of the Currency of all his acts and proceedings. The Comptroller shall thereupon cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof. And from time to time the Comptroller, after full provision shall have been first made for refunding to the United States any such deficiency in redeeming the notes of such association as is mentioned in this act, shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction."

By section 47 it is provided that the *United States shall have the first and paramount lien upon all the assets* of such insolvent bank for the purpose of making good any deficiency (in the proceeds of the bonds pledged by the bank), to meet the amount expended in paying the notes of the bank. This lien, it is further declared, shall have the preference to all other claims whatsoever, except the necessary costs and expenses of administering the assets. In *National Bank v. Colby*, 21 Wall. 609; Thomp. N. B. Cas. 109, the Supreme Court of the United States held that the property of an insolvent National bank, attached at the suit of a creditor, before the appointment of a receiver, cannot be subjected to a sale for the payment of his demands, against the claim for the property by a receiver of the bank subsequently appointed. The court, in construing the Banking Act, says: "There is in these provisions a clear manifestation of a design on the part of Congress: 1st. To secure the government for the payment of the notes, not only by requiring in advance of their issue a deposit of bonds of the United States, but by giving to the government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and 2d. To secure the assets of the bank for ratable distribution among its general creditors. This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings. The priority of the United States and the ratable distribution among the general creditors, so studiously provided

Mayor, etc., of Macon v. First National Bank of Macon.

for in the act, would in that case be lost." See, also, *Ocean National Bank v. Carll*, 7 Hun, 237; Thomp. N. B. Cas. 793.

Whatever might be the rights of the defendant if the statutory lien had attached to the specific property by virtue of a levy thereon prior to the insolvency of the bank, we are satisfied, that accepting as true the averments in the complaint, the court did not err in issuing the preliminary injunction. The order denying the motion to dissolve the same will be

Affirmed.

MAYOR, ETC., OF MACON V. FIRST NATIONAL BANK OF MACON.

(50 Ga. 648.)

Municipal taxation — injunction of banking business.

A National bank is not subject to local municipal taxation of its business, and the enforcement of such tax may be enjoined.

APPPLICATION for an injunction. The opinion states the case. The injunction was issued below.

R. W. Jemison, for plaintiff in error.

Lanier & Anderson, Hill & Harris, for defendant.

JACKSON, J. The city authorities of Macon levied a tax upon the business of the First National Bank, operating therein under the act of Congress; the bank applied for an injunction, the Chancellor granted it, and the city excepted.

We think that the Chancellor was right. Whilst the property owned by the bank may be taxed by State authority, and the shares owned by the stockholders may be also taxed, the business of the bank — its right to operate and do banking business — cannot be taxed by the State; and if not, of course it cannot be by any municipality which derives its taxing power from the State. The distinction between the right to tax property and that to tax business in cases of agencies working under Federal authority is well settled, we think, by the Supreme Court of the United States. 4 Wheat. 430; 9 Wall. 353; 18 id. 5, 10, 36, 37.

Merchants and Planters' National Bank v. Trustees of Masonic Hall.

There is nothing decided in any subsequent case which controverts this distinction.

As this is clearly an effort to tax *the business* of this bank, it is illegal, and the Chancellor did right to grant the injunction. See R. S. U. S. §§ 5214, 5219.

Judgment affirmed.

MERCHANTS AND PLANTERS' NATIONAL BANK v. TRUSTEES OF
MASONIC HALL.*

Jurisdiction — injunction — receiver.

Where judgment has been rendered in a State court against a National bank, and upon the execution issuing thereon, a return of *nulla bona* has been made by the sheriff of the county where the bank is located, and the bank has ceased to discharge its functions as a fiscal agent of the United States, and is disposing of its assets, which cannot be reached by levy and sale under the common-law execution among its stockholders, thereby endangering the safety of those assets and the judgment debt of the creditor, equity will relieve by the grant of injunction and the appointment of a receiver.

Until a receiver has been appointed by a Federal court wherein the interposition of equity to settle the affairs of a National bank was invoked, and the appointment of a receiver asked to take charge of the assets, neither law or comity requires the State court to suspend its equitable remedy to reach the assets of the bank and enforce its own final process until the Federal court shall act — especially where in the Federal court the case is made by the stockholders of the bank and the judgment creditor is not made a party thereto.

(Supreme Court of Georgia.)

THE opinion states the case.

J. O. O. Black and Barnes & Cumming, for plaintiffs in error.

J. S. & W. T. Davidson, Hook & Webb, and *Joseph Ganahl*, for defendants.

JACKSON, J. 1. The return of *nulla bona* was made by the sheriff upon the execution issued in favor of the trustees of the Masonic Hall against the Merchants and Planters' National

* Not yet reported.

Merchants and Planters' National Bank v. Trustees of Masonic Hall.

Bank, and thereupon the plaintiffs in execution filed a bill invoking the grant of injunction to restrain the further distribution of the assets of the bank among the creditors and stockholders, and the appointment of a receiver to take possession of the assets and keep them in safety to answer a decree to subject them to the judgment. The Chancellor granted the injunction and appointed the receiver, and error is assigned upon his judgment and interlocutory order thereon.

We are unable to discover the error. The bank is no longer an agent of the United States. It has gone into liquidation. It has no ostensible property on which a levy can be made; its president declines and refuses to point out any property whereon the common-law *fi. fa.* can be levied; he openly proclaims that the judgment shall not be paid while it can be resisted; the stockholders have been paid large sums of money, so that the assets are reduced from \$225,000 to \$40,000; and how soon the remaining assets may, in like manner, be scattered amongst stockholders—many of them non-resident—no man can foresee. The only fund, therefore, out of which this judgment debt can ever be paid is in danger, and in such cases a receiver will be appointed, unless other good reasons be exhibited against it, for the bank is insolvent so far as available legal assets within the reach of levy and sale under the common-law *fi. fa.* are concerned, and the only hope of the creditor is in the assets not capable of being levied on, and rapidly disappearing. Code, §§ 3098, 3149, 274, 1946; Thomp. Nat. Bk. Cases, 406, 321, 912, 203, 792, 77, 559, 774, 786; Rev. Stat. U. S., § 5597.

2. But it is said that a Georgia State court will not interfere with a court of the United States first obtaining jurisdiction, and that such a court has jurisdiction and in contemplation of law is in possession of the *res* when the bill is brought to dispose of it as soon as the bill is filed, and is not postponed to the time that a receiver is actually appointed. That is so, we hold, in cases where the receiver is appointed. Such appointment will date back to the time of filing the bill; and the State receiver will yield to the Federal receiver, especially when by collusion the former was appointed on purpose to be ahead of the latter in point of

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time. This was ruled substantially by this court in *May v. Printup, receiver*, 59 Ga. 128. But it would seem here that the stockholders' bill has been pending a long while in the Circuit Court of the United States, and no receiver is yet appointed. Perhaps none ever will be. Is the judgment creditor to wait until one is appointed? He is not even in the case, or rather the Masonic Hall is not a party to the bill in the United States court. If it were, and if the bill filed there were similar to this in review here, and could accomplish the same end, to wit: the collection of this debt by this judgment creditor, having the final process of a State court in its hands, even then we should rule that neither law nor equity nor comity would require the State court of equity to wait upon the United States court in a case like this. When that court does act, if it ever should, then will be the time to ask the State court to force its receiver to turn over the assets to the Federal receiver, unless indeed the good sense of the two officers should harmonize in their management of the trust fund by securing the judgment and then turning over the balance of the fund to the United States receiver.

Judgment affirmed.

NOTE. — The bill in the United States court referred to was brought by one Fause, a stockholder of the bank, in September, 1878. It set out the claim of the present complainants and prayed a receiver to settle the affairs of the bank. Complainants, however, were not made parties, and no action appeared to have been taken on the bill.

 WARREN V. DEWITT COUNTY NATIONAL BANK.

(3 Bradwell, 305.)

Mortgage as security for loan.

A mortgage of real estate executed to a National bank as security for a matured antecedent loan is not void.

FORECLOSURE. The opinion states the point. The complainant had judgment below.

Moore & Warren, for appellants.

Donaghue & Lemon, for appellees.

McCULLOCH, J. [Omitting statement and immaterial points.] The objection taken to this decree, on the ground that the deed of trust to Clagg is void, as being in excess of the power of a banking corporation organized under the laws of the United States, cannot be maintained. It is true our Supreme Court, in *Fridley v. Bowen*, 87 Ill. 151 (*post*), has decided such securities void, and refuses relief thereon when sought in equity; yet since that decision was made, the Supreme Court of the United States, in *Union National Bank v. Matthews* (*ante*, p. 12), reversing *Matthews v. Skinker*, 62 Mo. 329; s. c., 21 Am. Rep. 425; Thomp. N. B. Cas. 647; cited by appellant's counsel, has decided that such securities are not void, but only voidable, and the sovereign alone can object. The same principle had been adopted by our own Supreme Court in regard to domestic corporations before the decision in *Fridley v. Bowen*, *supra*, and the same doctrine adopted, at least to the extent, that if a corporation has power to take a grant of land at all, then a grant in excess of such power is not void, but only voidable by the sovereign, in a proceeding instituted for that purpose. *Hough v. Cook County Land Co.*, 73 Ill. 23.

If the security is not void, but only voidable, in manner above indicated, we see no reason why a banking corporation organized under the laws of Congress should be denied the proper relief in the State courts. But be this as it may, the proof in this case is that the deed of trust and the note secured thereby, which bears the same date, were given to secure an antecedent debt then past due, and for which the bank had no security. This being so, the case comes within one of the saving clauses of the act of Congress, and for that reason the security is valid. Rev. Stat. U. S., § 1999.

FRIDLEY V. BOWEN.*

(87 Ill. 151.)

Mortgage to bank officer to secure present loan.

A real mortgage executed to a bank officer, at the time of, and to secure a loan by the bank, is void.

BILL to foreclose a mortgage by Edmund D. Taylor and wife, to secure a promissory note payable to Edwin A. Bowen. The opinion states the facts. The plaintiff had judgment below.

B. F. Fridley and R. G. Montony, for plaintiff in error.

Frank J. Crawford and Lucien B. Crooker, for defendant in error.

SCOTT, J. [Omitting an immaterial point.] On the other point decided we cannot concur in the views expressed by the court. Our opinion is, the answer, if true, presents a complete defense to the bill. The matters set forth in the answer are supported by affidavits, and as there are no counteraffidavits tending to disprove the allegations of the answer, we must, for the purposes of this motion, assume the facts stated are true. It appears defendant had been the owner of the mortgaged property, and had sold it to Edmund D. Taylor for stock in the "Coal and Iron Company" of La Salle, and had made him an absolute deed for the same, which was recorded in the county of Cook, where the property is situated. Afterward, defendant, claiming to have been defrauded and overreached in the transaction by false representations as to the value of the stock he was to receive, induced Taylor to rescind the contract, and to reconvey the property to him. But in the meantime, Taylor had borrowed of the National Bank of Mendota the sum of \$10,000, for which he had given his promissory note to Edwin A. Bowen, the president of the bank, and secured it by a mortgage on the property in controversy. These facts distinctly appear by averments in the answer,

* See, *contra*, *Warren v. DeWitt County Nat. Bank*, ante, p. 222.

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and the point is made, that taking the mortgage to the president for money borrowed of the bank is, in fact, making the mortgage to the bank itself, and being a mere device to evade the law, it is void, under the Banking Act, which, it is said, forbids National banks from making loans upon any other than personal security. The proposition, that borrowing money of a National bank, and giving the mortgage security to one of its officers, is giving it to the bank itself, is so self-evident it needs no argument in its support. Otherwise, if such devices to evade the law could be tolerated, the inhibitions found in the Banking Law on the operations of banks, in that particular, would be rendered nugatory.

Regarding the mortgage in this case as having been made to the bank, our inquiry will be, whether a National bank, under the general law under which it is organized, is forbidden to take mortgage security upon real estate for loans concurrently made by it in the course of business. It is a well recognized principle that a bank can only exercise its franchises and powers in the manner prescribed by the law under which it is organized. It is so with all bodies having only a statutory existence. *Metropolitan Bank v. Godfrey*, 23 Ill. 579. The General Banking Law (Rev. Stat. 7th div. of § 5136) confers powers upon banking associations to loan money on "personal security." Where one mode of exercising an express power by a banking corporation is prescribed in the fundamental law creating such corporation, by implication it would seem to forbid the exercise of such power in any other way. Limiting such corporations to the exercise of such powers as are expressly conferred, or to such as are necessarily implied in the general powers granted, as the rule is, that is the only construction this statute will bear. It is equivalent to an express provision, such corporations may loan money on "personal security," but not upon real estate security.

If there could be any doubt as to this construction, we think it is settled by the context. In the next section of the Banking Law after the one cited, it is declared for what purposes National banking associations may purchase, hold and convey real estate, and "for no others." On reference to that section it will be seen no power is given to banking associations to secure

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any loans by real estate mortgages. A banking corporation, under the General Banking Act, may hold such lands as may be necessary to accommodate its business, or as shall be mortgaged in good faith to secure debts previously contracted, or such as shall be conveyed to it in satisfaction of debts previously contracted in the course of dealings, or such as may be purchased under judgments, decrees or mortgages held by the association, or such as it shall purchase to secure debts due it, but in no event shall the title to such lands as shall be purchased to secure debts due the association, be held for a "longer period than five years." No construction, it seems to us, can make these provisions of the Banking Law plainer than they are. The provision declaring upon what security such associations may make current loans, viz.: Upon "personal security," and the subsequent inhibition that no mortgage shall be taken on real estate, except by way of security for debts previously contracted, must be understood to forbid absolutely such associations making loans upon security afforded by mortgages on real estate. With the policy of the law on this subject we have nothing to do. Considerations of public policy might be readily suggested in its support, but the propriety or necessity of such a law need not be discussed. It is sufficient the act of Congress has forbidden National banking associations to make loans on real estate mortgages. Mortgages upon real estate taken by such associations to secure current loans are therefore without authority of law, and hence are void, and the courts will not lend their assistance to such associations to make such securities available. The mortgagor, in such cases, may defend against the mortgage, but as the transaction is illegal, the law will assist neither party, but leave them where it finds them. The rule on this subject is, where it appears the party has broken the law, courts will not assist him, although there may be justice in the claim he seeks to enforce. The views here expressed find sanction in the following cases: *Foroler v. Scully*, 72 Penn. St. 456; s. c., 13 Am. Rep. 699; *Thomp. N. B. Cas.* 854; *First National Bank v. National Bank*, 2 Otto, 122; *Matthews v. Skinker*, 62 Mo. 329; s. c., 21 Am. Rep. 425; *Thomp. N. B. Cas.* 647.

The decree will be reversed and the cause remanded.

Decree reversed.

WORCESTER NATIONAL BANK V. CHEENEY.

(87 Ill. 608.)

Mortgage for antecedent debts.

As security for a pre-existing debt, a National bank may make an assignment of a note and a real mortgage contemporaneously executed to secure such note.

THE opinion states the case. The complainant had judgment below.

Henry B. O'Reilly, C. D. Hodges, and Wm. Brown, for appellant.

Warren & Pogue, for appellee.

SCHOLFIELD, C. J. This is a controversy between Prentiss D. Cheeney and The Worcester National Bank, of Worcester, Mass., in regard to a large steam flouring mill at Kane, Greene county. Cheeney's claim rests upon a sheriff's deed, made pursuant to sale on a special execution issued on a judgment in attachment in his favor, and against one George W. Howe. The claim of the bank rests, primarily, upon a trust deed in the nature of a mortgage, executed by Donald Carmichael to Marcus M. Johnson, to secure the payment of promissory notes for \$15,000.

The purpose of Cheeney's original and supplemental bills was to have the claim of the bank declared fraudulent, as against his rights, and the several conveyances under which it makes claim, removed, as a cloud upon his title — and to this purport was the decree of the court below.

[Omitting immaterial points.]

Another objection urged against the validity of the assignment is, that the Worcester National Bank is, by the statute under which it is created, prohibited to take mortgages on real estate, etc.

A sufficient answer to this objection is, that the prohibition does not extend to mortgages made, in good faith, by way of security for debts previously contracted.

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Power is expressly given to every National bank, by the second subdivision of section 5137 of the Revised Statutes of the United States, p. 999, to purchase, hold and convey such real estate "as shall be mortgaged to it, in good faith, by way of security for debts previously contracted." See, also, *First National Bank v. Exchange Bank*, 92 U. S. 122, Thomp. N. B. Cas. 124.

It has been seen that, in the view we take of the evidence, the deed of trust under consideration was assigned to the bank in good faith, by way of security for debts previously contracted.

Decree reversed.

MAPES V. SCOTT.

(88 Ill. 352.)

Purchase of real estate to secure antecedent debt.

To secure a pre-existing debt, in good faith, a National bank may acquire title to real estate by direct conveyance or judicial sale, although such real estate may be incumbered. (*See note, p. 233.*)

EJECTMENT. The opinion states the case. The defendant had judgment below.

Oscar A. De Leuw, and *Epler & Callon*, for plaintiffs in error.

Dummer, Brown & Russell, and *J. T. Springer*, for defendants in error.

DICKEY, J. This is ejectment, brought in the Circuit Court, by plaintiffs in error, against defendants in error, wherein judgment was rendered for defendants.

The property involved is a mill and its site. Before 1868, the title was in plaintiffs.

On November 21, 1868, the plaintiffs, being in possession, made a deed of trust to Dummer & Kirby, conveying this prop-

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erty to secure the payment, first, of \$5,116.67 to Murray McConnell, and next, \$20,000 to Scott Brothers, of St. Louis, for which their note, of same date, was given, payable in installments of \$5,000 each, the first on 21st of June, 1869, and \$5,000 yearly thereafter for three years. This \$20,000 was more than the amount actually owing to the Scott Brothers by Mapes & Co., but it was to be reduced by certain credits to which Mapes & Co. were entitled for sales already made by Scott Brothers, and for which account of sales was to be rendered by Scott Brothers, and credited on the note. The amount of such credits is not definitely shown, but the proof tends to show that the real debt was much less than the amount stated on the face of the note. The \$20,000 note and this deed of trust were transferred by delivery, soon after, to the First National Bank of Jacksonville.

On the 31st of July, 1869, plaintiffs in error conveyed to the bank the property, by a general warranty deed, and the bank conveyed the property to Sylvester Moore.

Defendants are in possession, and claim title under Moore by conveyance from him.

Plaintiffs claim that no title passed from them by virtue of their deed to the bank, for they insist that the bank was incapable, under its charter (the General Banking Law), of taking, holding or conveying real estate, under the facts of this case.

It was shown, by the proofs, that, for some time before November, 1868, Mapes & Co. were manufacturers of flour, near Jacksonville, Ill.; that Scott Brothers were commission merchants at St. Louis, and that a business had been carried on for the sale of flour in St. Louis, in which these firms and the bank were actors. By an arrangement between the three parties, Mapes & Co., when they shipped flour to St. Louis, took the shipping bills to the bank and drew on Scott Brothers for the price of the flour, the bank cashed the drafts and sent them to St. Louis for acceptance and payment by Scott Brothers. Shortly before December 8, 1868, Scott Brothers, being in embarrassed circumstances, permitted certain of these drafts, after acceptance, to go to protest for non-payment. On demand of the bank, Scott Brothers had an accounting with the bank as to these unpaid drafts, and gave

their note to the bank, on December 8, 1868, for \$7,500, and, as collateral security for the payment of the same, delivered to the bank the \$20,000 note of Mapes & Co. (indorsed in blank), and the deed of trust.

About the last of July, 1869 (Scott Brothers having paid only \$1,000 of this \$7,500), the property in question was conveyed by the plaintiffs to the bank, in satisfaction of the \$20,000 note, the bank assuming the payment of the incumbrance to McConnel, and also assuming the payment of certain mechanic liens upon the property for about \$2,000, of which it appears the bank officers had no knowledge until about this time. At this time, Scott Brothers were insolvent, and Mapes & Co. were in straitened circumstances. This was also a satisfaction of the \$7,500 note. About these facts there seems no dispute. The only contradiction in the evidence is this. The plaintiffs gave evidence tending to prove that when the drafts in question were cashed by the bank, it was under an agreement that Mapes & Co. should not be held thereon as drawers, but the bank was to rely solely upon Scott Brothers for acceptance and payment. This the defendants deny, and give evidence tending to prove that it was not so. The weight of the evidence on this point seems to be with defendants. In the view we take of this case this question is not material.

The act of Congress on this subject provides, that "a National banking association may purchase, hold and convey real estate for the following purposes, and for no others: * * * *; third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings."

There can be no reasonable question that the debt of Scott Brothers on their note of \$7,500 was a debt to the bank "previously contracted in the course of its dealings." That debt was contracted by Scott Brothers when they accepted the drafts which afterward went to protest—even if we assume that Mapes & Co. did not also contract to pay the same debt by drawing the drafts.

On the 31st of July, 1869, \$6,500 of that previously contracted debt remained unsatisfied, and the bank had the lawful authority

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to accept real estate in satisfaction of that debt. The transfer of the note and trust deed by Scott Brothers to the bank was, in substance, a request of Scott Brothers to Mapes & Co. to pay that debt. Under such request, the bank had lawful authority to accept the conveyance from the plaintiffs for that purpose. We perceive no difference between the legal effect of this transaction and that of a conveyance of this property to Scott Brothers in satisfaction of the real amount due upon the \$20,000 note, and a subsequent conveyance of the same property by Scott Brothers to the bank in satisfaction of their debt to the bank.

The making of the deed of July 31, 1869, to the bank, in its legal effect, satisfied the \$20,000 note, and also the \$7,500 note. In cancelling the latter, the bank acted for itself. In cancelling the former, the bank acted as the representative of Scott Brothers, and its warrant for so doing was found in the assignment of the \$20,000 note.

When the apparent reason for permitting such banks to "purchase, hold and convey" real estate for certain purposes, and for no other, is considered, it will be seen that this transaction is within the spirit, as well as the letter, of the law.

The funds of the bank are not to be locked up in real estate investments, for that would hazard the interests of its stockholders and creditors, and impair its capacity for serving the commerce of the country by doing a legitimate banking business; but this limitation is not to tie the hands of the bank, so as to prevent any business transaction in real estate, had for the purpose of protecting it, its stockholders or creditors, from loss on debts owing to it, and contracted in the course of its legitimate business as a bank. Hence, to accept real estate mortgages to secure such debts, or to accept real estate in satisfaction of such debts, is permitted, either by voluntary sale to it or by sales on judicial process.

Nor is it forbidden, by either the letter or the spirit of the law, to make such purchase, for such purpose, of real estate which is incumbered. In such case, the purpose of the transaction must be kept in view. If the real purpose of such purchase is to save a debt previously contracted in the course of its legitimate busi-

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ness, such purchase is lawful. If the purpose of the purchase is to speculate in real estate, under the form or pretense of attaining the satisfaction of a previous debt, such purchase, it is conceived, is forbidden by both the letter and spirit of the statute. Where the amount of the debt satisfied by such a purchase is very small, and the amount to be paid to discharge the incumbrances is very large, such fact may well be considered in ascertaining the real purpose of the transaction, and might tend strongly to show an unlawful purpose.

In the case at bar, there is no ground of suspicion that the bank officers were moved by any motive other than to save the doubtful debt on the \$7,500 note, and accomplish its satisfaction.

The judgment of the Circuit Court must be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.—See *Worcester Nat. Bk. v. Cheney*, ante, p. 227, to the same effect. In *Mapes v. Scott*, 94 Ill. 379, the court said:

"The plaintiffs, in establishing their chain of title, offered in evidence two certain deeds made to the First National Bank, Jacksonville. It is insisted by the defendants that these deeds should have been excluded—that the bank could not take and convey real property. Testimony was introduced tending to prove that the bank acquired the property in payment of a pre-existing debt. There can be no doubt in regard to the right of a National bank to acquire real estate in

satisfaction of a pre-existing indebtedness. In *Mapes v. Scott*, 88 Ill. 352, this point was expressly decided. But independent of this view, the right of the bank to acquire the property could not be raised in this collateral manner. Conveyances to a National bank must for all purposes be regarded as valid until called in question by a direct proceeding instituted for that purpose by the government, as held in *National Bank v. Matthews*, 8 Otto, 621 (ante, p. 12). As this decision of the Supreme Court of the United States involves a construction of an act of Congress, it is paramount and must prevail."

 MIX v. NATIONAL BANK OF BLOOMINGTON.

(91 Ill. 20.)

Evidence of existence of bank — certificate of Comptroller of Currency.

In an action by a National bank on a note, where the existence of the corporation is denied, the certificate of the Comptroller of the Currency, under section 22 of the National Banking Act, that the association had complied with the law and was authorized to do banking business, was competent

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evidence, and in connection with proof that the association had done banking business for several years, and the fact that the note was in terms payable at the bank, makes a *prima facie* case.*

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

Stephen R. Moore, for appellant.

O. W. Aldrich and *T. C. Kerrick*, for appellee.

SHELDON, J. This was a suit brought by the National Bank of Bloomington, as indorsee, upon a promissory note made by the defendant to one C. M. Nichols, and indorsed by the latter to the plaintiff, as follows :

"\$2,745.25. BLOOMINGTON, ILL., April 28, 1875.

Six months after date I promise to pay C. M. Nichols \$2,745.25, at National Bank of Bloomington, Illinois. Value received, with interest at ten per cent per annum from date if not paid at maturity.

JAMES MIX."

"Indorsed : C. M. NICHOLS."

Besides the general issue, there were the pleas of *nul tiel corporation*, *non est factum* verified by affidavit, and partial failure of consideration, upon which issues were joined, and found by the jury in favor of the plaintiff, and damages assessed to the amount of the note and interest, upon which judgment was rendered, and the defendant appealed.

It is objected, that under the issue upon the plea of *nul tiel corporation*, the court below admitted in evidence the certificate of the Comptroller of the Currency issued under section 22 of the National Bank Act (U. S. Stat., § 5169), providing (after the association of individuals desiring to organize a National bank has done certain things as required by § 13) that "the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the

* To same effect, *Thatcher v. West River Nat. Bank*, Thomp. N. B. Cas. 622, and *Casey v. Galli*, id. 142.

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business of banking, and that such association is authorized to commence business." There was, besides, evidence that the bank had been acting as a National bank for eleven years; and the existence of the bank is acknowledged in the note signed by the defendant, it being made payable at the bank. We think the certificate was properly enough received in evidence, and that the evidence was amply sufficient to establish, at least *prima facie*, the existence of the corporation.

[Omitting other questions.]

Judgment affirmed.

NATIONAL BANK OF WINTERSET V. EYRE.

(8 North Western Reporter, 905.)

Usury — penalties.

Where a National bank lends money upon a usurious contract, and attempts to enforce such contract in a State court, the defendant may insist upon such usury as a defense.

(Supreme Court of Iowa.)

ACTION upon a promissory note. Defense of usury. The plaintiff had judgment below.

Wainright & Miller, for appellants.

Leonard & Steele and *McCaughan & Dabney*, for appellee.

ADAMS, J. 1. Where a National bank loans money upon a usurious contract, such penalties, and only such, can be enforced as are provided in the National Banking Act. *Farmers & Mechanics' National Bank v. Dearing*, 1 Otto, 29; Thomp. N. B. Cas. 117. Such being the law, it is insisted by the plaintiff that the plea of usury against a National bank can be maintained only in a Federal court. The argument is that the forfeiture provided is strictly in the nature of a penalty, and that only United States courts have jurisdiction to punish offenses arising under a United States statute.

The plaintiff relies upon section 711 of the Revised Statutes of the United States, which provides, in substance, that the

United States courts shall have exclusive jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States; and while an attempt was made in the National Banking Act to confer upon State courts jurisdiction in all proceedings against any association organized under the act, yet it is said that the attempt is wholly nugatory, because it is not within the power of Congress to add to or enlarge the jurisdiction of State courts. Upon this point the plaintiff cites *Martin v. Hunter's Lessees*, 1 Wheat. 304; *Houston v. Moore*, 5 id. 1; and *Missouri River Tel. Co. v. First National Bank of Sioux City*, 74 Ill. 217; s. c., Thomp. N. B. Cas. 401. In the view which we take of the case it is not necessary to determine whether it is within the power of Congress to confer upon a State court jurisdiction of a matter of which it has not already jurisdiction under the Constitution and laws of the State in which the court exists. The provision in question should certainly be deemed sufficient to evince the intention on the part of Congress that the jurisdiction of the Federal courts should not be held to be exclusive.

We come, then, to the question as to whether, under the Constitution and laws of Iowa, the court below had jurisdiction to entertain and determine the question raised in the defendant's answer. The plaintiff contends that it had not, and that, too, independent of the provision cited, giving United States courts exclusive jurisdiction in suits to enforce penalties and forfeitures. Upon general principles it is said that the penal statutes of any sovereignty can be enforced only by the courts which belong to that sovereignty.

Without denying that in a certain sense the doctrine enunciated is correct, we are disposed to think that it would be carrying the doctrine too far to hold that a borrower of money from a National bank, at a rate of interest which is usurious, cannot, when sued by the bank in a State court to recover interest, maintain the plea of usury as a defense in the same court. No court, so far as we have been able to discover, has so held. It is true that in *Newall v. National Bank of Somerset*, 12 Bush, 57; Thomp. N. B. Cas. 501, an action brought to recover for a loan in which

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the defendants (plaintiffs in error) pleaded usury, the court said: "The courts of this State have not, up to this time, undertaken to enforce penalties arising under the laws of the government of the United States, and this case presents no sufficient reason to authorize the inauguration of a new judicial policy. In that case, however, the court found that there was no usury, and the remark quoted can hardly be deemed as having the force of authority.

The case of the *Missouri River Telegraph Company v. First National Bank of Sioux City*, above cited, while not strictly in point, tends, it must be conceded, to support the doctrine which the plaintiff seeks to maintain. The action was brought to recover for usurious interest paid. It was held that as the defendant bank was located in Iowa, and the action was brought to recover under a statute of the United States essentially penal in its character, a State court of Illinois could not take jurisdiction.

Where usurious interest is paid to a National bank upon a usurious contract made with the bank, the statute allows the borrower to recover back double the amount of usurious interest paid. It is manifest that the provision of the statute which allows such a recovery is more strictly penal in its character than the provision which simply allows usury to be pleaded as a defense. The plaintiff's statement in his petition that he is entitled to recover certain interest is not true. Now, in an action which is brought to enforce a claim which is not valid, it would be strange if in the same action the defendant could not be allowed to resist the claim. It is a civil right to make such resistance, and we think that he must be allowed the right, in whatever forum the claim is asserted, even though the enforcement of the right would operate in some sense as a penalty upon the plaintiff. This rule seems to us to be correct upon principle, and to be sustained by the decisions. *Hade v. McVay*, 31 Ohio St. 231, *post*; *Ordway v. Central National Bank*, 48 Md. 217, *post*; *Bletz v. Columbia National Bank, Pa.*, 87 Penn. St., *post*.

[Omitting the question of fact.]

Reversed.

FIRST NATIONAL BANK OF WATERLOO V. ELMORE.

(3 North Western Reporter, 547.)

Mortgage to secure loans.

A real mortgage to a National bank to secure a present debt or future advances
is not void.

(Supreme Court of Iowa.)

FORECLOSURE. The opinion states the point.'

Alford & Elwell, for plaintiff.

J. S. Root, for defendant C. E. Holt.

A. M. Harrison, for O. A. Pray and Leffell & Co.

George F. Boulton and *West & Easton*, for Union Bank of Cedar Rapids.

DAY, J. 1. Is the plaintiff's mortgage *ultra vires*, and void, under section 5136, Revised Statutes United States? This question has recently been determined by the Supreme Court of the United States in the *Union National Bank of St. Louis v. Matthews*, 98 U. S. 621 (*ante*, 12). In that case an injunction was obtained in the State court of Missouri restraining the bank from proceeding to sell under a deed of trust executed to the bank in security for a loan of \$15,000. Upon writ of error to the Supreme Court of the United States, the judgment of the State court was reversed. In the course of the opinion respecting the defense that the trust deed was taken in violation of the Banking Act, and was void, the court say: "We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished, and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur.

"The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow

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whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the government." As the question under consideration arises under a statute of the United States, this decision of the United States Supreme Court is authoritative and binding upon us, and is conclusive of the validity of the mortgage in question as between the parties thereto.

[Omitting other points.]

PAPE V. CAPITOL BANK OF TOPEKA.

(20 Kans. 440; 27 Am. Rep. 183.)

Power to purchase negotiable paper.

A bank, empowered to discount negotiable notes, has power to purchase such notes.*

FORECLOSURE. The opinion states the facts. The plaintiff had judgment.

W. P. Douthitt and J. D. McFarland, for plaintiffs in error.

N. C. McFarland and J. G. Slonecker, for defendant in error.

BREWER, J. This was an action brought by The Capitol Bank of Topeka, to recover a personal judgment against Pape and wife, on three promissory notes made by them, and to foreclose a mortgage on lands in Shawnee county, given by them to secure the payment of said notes. The notes are made payable to "James M. Spencer, or bearer," and have written across the back "pay to bearer, without recourse on me: James M. Spencer." The mortgage was made to Spencer, and has indorsed thereon an assignment to "The Capitol Bank of Topeka." The notes and mortgage were made at Topeka on 27th of June, 1872, and are alleged to have been transferred to the defendant in error on 13th of

* See, *contra*, *Farmers & Mechanics' Bank v. Baldwin* (23 Minn. 196), 23 Am. Rep. 622; *First Nat. Bank of Rochester v. Pierson* (Minn.), 16 Alb. Law Jour. 319, and *Thomp. N. B. Cas.* 697, and note, 699; *Lansac v. Nat. Union Bank*, *post*.

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March, 1873. The petition also alleges that said bank is a body corporate, duly incorporated under and by virtue of the laws of the State of Kansas, as "The Capitol Bank of Topeka." The defendants answered separately, each interposing several defenses, only two of which are relied on, and they may be briefly stated as follows: First, a denial that plaintiff was or ever had been a body corporate under the laws of the State of Kansas as "The Capitol Bank of Topeka" (which denial was verified by the affidavits of the defendants); second, defendants admitted the making of the notes and mortgage sued on, but alleged that the plaintiff purchased the same of said Spencer, at a price agreed upon and for speculative purposes, and did not acquire or hold said notes or mortgage, or either of them, by reason of having made a loan of money on them, or either of them, or for any of the purposes for which it could legally acquire or hold the same, or either of them.

[Omitting the consideration of the first defense.]

IV. The final question as to the power of the plaintiff to acquire and hold the note and mortgage. The note and mortgage were made to Spencer. From him, as the owner and holder, the bank purchased. Was such a purchase beyond its power? Section 127 of article 16 of the General Incorporation Law (Gen. Stat. 225), specifically defines the powers of such associations, and is as follows:

"Any five or more persons in any county in this State may organize themselves into a savings association, and shall be permitted to carry on the business of receiving money on deposit, and to allow interest thereon, giving to the person depositing, credit therefor; and of buying and selling exchange, gold, silver, coin, bullion, uncurrent money, bonds of the United States, of the State of Kansas, and of the city, county and school district in which any association shall be organized; of loaning money on real estate, and personal security, at a rate of interest not to exceed twelve per cent per annum; and of discounting negotiable notes, and notes not negotiable; and on all loans made may keep and receive the interest in advance."

Now the contention is, that the clause under which alone au-

thority for this purchase can be claimed is that which authorizes "discounting negotiable notes, and notes not negotiable;" and that this was not a discount but a purchase. Counsel for plaintiffs in error say:

"Whatever loose or general meaning may have been given to the term *discount*, when not applied to banking business, no proposition is more firmly established by judicial decisions than this, that discounting paper as understood in the business of banking is only a mode of loaning money on the same and taking the interest in advance. *Niagara Co. Bank v. Baker*, 15 Ohio St. 56; *Talmadge v. Pell*, 3 Seld. 343; *Fleckner v. Bank of United States*, 8 Wheat. 338; *People v. Utica Ins. Co.*, 15 Johns. 391; *Fireman's Ins. Co. v. Ely*, 2 Cow. 699; *Philadelphia Loan Co. v. Towner*, 13 Conn. 259; *McLean v. Lafayette Bank*, 3 McLean, 597; *Dunkle v. Renick*, 6 Ohio St. 527; *Farmers and Mechanics' Bank v. Baldwin*, 23 Minn. 198; *Thomp. N. B. Cas.* 639; 23 Am. Rep. 680; *Fowler v. Scully*, 72 Penn. St. 456; s. c., 13 Am. Rep. 699; *Thomp. N. B. Cas.* 854. It necessarily follows from the reasoning of these cases, that there is a difference between *discounting* a note and *buying* it. For authority directly on this point, see *Morse on Banks and Banking*, 20, and 1 Bouv. Law Dict. 481, title *Discount*, citing *Pothier De l'Usure*, n. 128, where it is said the latter expression is used to denote that the transaction 'when the seller does not indorse the note, and is not accountable for it.'"

An examination of some of the authorities chiefly relied on by defendant may be of value. In *Fowler v. Scully*, 72 Penn. St. 456; s. c., 13 Am. Rep. 699; *Thomp. N. B. Cas.* 854, the question was as to the power of a National bank to take a mortgage to secure notes to be thereafter discounted; and by a divided court the mortgage was held void. There is nothing in the question or opinion which throws any special light on the question before us.

In the case of *Talmadge v. Pell*, 7 N. Y. 328, it was decided that a banking corporation, empowered "to carry on the business of banking by discounting bills and other evidences of debt," was not thereby authorized to traffic in State stocks, and that a

purchase of such stocks, with a view of sale, was beyond its powers.

In *Niagara Co. Bank v. Baker*, 15 Ohio St. 68, the plaintiff, a bank of the State of New York, sued the defendants as indorsers of certain promissory notes. The answer alleged a loan from the bank to them, and a discount of these notes at usurious rates. The reply denied any loan, and alleged that it discounted the notes in the usual course of business. Counsel for defendant laid down two propositions in their brief — 1st, that if the transaction was a loan, it was void for usury; and 2d, if a purchase, void for want of power in the bank to make it. The court in its opinion, after giving the general meaning of the word *discount*, as we quote hereafter, proceed: "And this brings us to the precise question upon which the decision of this case depends. Was this bank empowered to discount, *by way of purchase*, promissory notes? or must all such discounts be deemed loans, and thus be brought within the purview of the usury law?" And they conclude in favor of the latter alternative, saying, "But the naked power to discount paper is not given; it is the *power to carry on the business of banking by* (among other things) *discounting bills, notes and other evidences of debt.*" And then inquiring what "discounted paper" means, as used in the business of banking, hold, that it refers simply to loans, referring with especial stress to the case of *Talmage v. Pell*, *supra*, as an authoritative exposition of the New York statute under which plaintiff was organized.

In the case of *Farmers & M. Bank v. Baldwin*, 23 Minn. 198; 23 Am. Rep. 683; Thomp. N. B. Cas. 639, the language of the statute appears similar to that referred to in 15 Ohio St., *supra*. The bank was given "power to carry on the business of banking, by discounting bills, notes," etc.; and a majority of the court held, that that was not a power to purchase such securities, but simply to loan thereon, with the right to take lawful interest in advance.

In *Fleckner v. Bank*, 8 Wheat. 338, it appeared that the plaintiff purchased from another bank a note which had passed to it through several parties from the original holder. The bank was forbidden to deal in any thing except bills of exchange, gold or

silver, or take more than six per cent upon its loans or discounts. It was claimed that the purchase of this note was *ultra vires*; but the court held otherwise, holding that such purchase was but a discount. In the opinion, STORV, J., speaking for the court, says: "But in what manner is the bank to loan? What is it to discount? Has it not a right to take an evidence of the debt, which arises from the loan? If it is to discount, must there not be some *chose in action*, or written evidence of a debt, payable at a future time, which is to be the subject of the discount? Nothing can be clearer than that by the language of the commercial world, and the settled practice of banks, a 'discount' by a bank means *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank."

We may also at this time properly notice a late case cited by the plaintiff, that of *Smith v. Exchange Bank*, 26 Ohio St. 141; Thomp. N. B. Cas. 836. In that case the defense was, that the bank (a National bank) *purchased* the paper of the payees, and that it had no authority to make such purchase. Upon this the court uses this language: "It does not state that the purchase was made at a usurious rate of discount; but it avers that under the act of Congress to provide a National currency, under which the bank was incorporated, it had no authority to *purchase* the bill. It seems to be the idea of counsel making the objection, that negotiable paper, perfect and available in the hands of the holder, is not the subject of purchase by a National bank at any rate of discount. This view, we think entirely erroneous. We see nothing in the act of Congress, nor in reason, why a borrower may not obtain the discount by a bank of the existing notes and bills of others of which he is the holder, as well as of his own paper, made directly to the bank. It is true that, as between natural persons, the purchase of such paper when made in good faith, and not as a disguise for a loan, is not subject to the usury laws; but it is otherwise as to a bank. In the business of banking, the purchasing and discounting of paper is only 'a mode of loaning money.'" And further on, in reference to any question of usury,

the court holds that it arises between the bank and its customer, and not between it and the original parties to the paper.

These authorities go no further than this: That where an ordinary commercial bank is created, and power given it, not generally to discount, but specially to carry on the business of "banking by discounting," its power is limited to that of loaning money on paper, and on such loans subjects itself to the operations of the usury laws. It may not purchase, as an individual may, paper already existing at any price it may agree upon with the holder, but can only deduct from its face the legal interest in advance. We express no opinion upon these authorities, or the propositions they assert. But we draw two clear distinctions between them and the case at bar. And first, the plaintiff is not an ordinary commercial bank. At least, whatever may have been the practical workings of this bank, the intention of the legislature in the statute was a "savings bank." That is the title of the article. The grant is of authority to organize a savings association. The first power is to receive money on deposit, and allow interest thereon; and that is the main purpose of a savings bank. It is true, among the further powers are those of discount, and dealing in bullion and bonds; but it is needful that some powers be granted of so using the deposits, and other funds, as will secure their safety, and enable the corporators to pay the interest on the deposits, and at the same time receive adequate compensation for their labor and the use of their capital. Just as power is given to an insurance corporation to invest its funds in such manner as will be profitable. And in interpreting the powers possessed by a corporation, we must not make the interpretation depend on the manner in which the corporation actually exercises its powers, but upon the intention of the legislature in the enactment of the statute. The intention was "savings bank." The corporation may in fact have been a purely commercial bank. If it has misused its powers, the State alone may inquire. The extent of the powers granted is to be determined by the character of the institution intended by the legislature. It is said by the court, in the case from 23 Minn., *supra*, in support of the construction placed upon the powers granted by the statute: "The obvious intent of this legislation was to secure

to the public business loans and accommodations at what was then regarded reasonable and not exorbitant rates of interest, and also to protect the shareholders of banks, and the banks themselves, against the risk of loss from inadequate securities, such as would likely be taken under the tempting influence of high rates of interest, regulated only by the necessities of borrowers, and the cupidity of bank directors." But the primary purpose of a savings bank is not to facilitate commercial transactions by securing to the public business loans and accommodations, but to furnish a safe place of deposit for funds. The other powers are subordinate to this.

Again, the power granted is the naked power of discounting, and not the power of carrying on the business of banking by discounting. And the term "discounting" includes purchase as well as loan. "To discount signifies the act of buying a bill of exchange, or promissory note, for a less sum than that which upon its face is payable." 1 Bouv. Law. Dict., title *Discount*. "It is also undeniably clear that the term *discount*, when used in a general sense, is equally applicable to either business or accommodation paper, and is appropriately applied, either to *loans* or *sales* by way of discount, when a sum is *counted off*, or taken from the face or amount of the paper, at the time the money is advanced upon it, whether that sum is taken for interest upon a loan, or as the price agreed upon a sale." *Niagara Co. Bank v. Baker*, 15 Ohio St. 85. See, also, case from 8 Wheat., *supra*.

We conclude, therefore, that the purchase of the note and mortgage in question was within the powers granted to this savings bank.

This disposes of the case, and compels an affirmance of the judgment.

All the justices concurring.

Judgment affirmed.

TICONIC NATIONAL BANK v. BAGLEY.

(68 Me. 249.)

Assignment of suit on promissory note — ultra vires.

A National bank, having discounted a note for an indorser, and having sued the maker, may receive payment from the indorser and assign the note and the suit to the indorser, and he may prosecute it in the name of the bank for his own benefit against the maker.*

ACTION on a note. The opinion states the facts.

E. F. Webb, for plaintiffs.

W. P. Whitehouse, for defendant.

BARROWS, J. The case is presented to us for such judgment as the law and facts require upon a report consisting mainly of a statement of facts admitted, from which it appears that the suit is against defendant as promisor upon a note for \$272, signed by him, dated September 1, 1874, and payable in one year after date to the order of one Mahan, who sold it to one Heath, for whom on the 19th of April, 1875, it was discounted by the plaintiffs, being indorsed by Mahan and Heath, and being protested at maturity, was passed to plaintiffs' attorney by their cashier, and this suit was commenced October 2, 1875, entered at the October term, answered to and continued, and defendant pleads the general issue. The second indorser, Heath, died, and his executor, at the request of the plaintiffs, on the 17th of February, 1876, paid the plaintiffs \$283 and took up the note, but this suit was still continued in court, and on March 24, 1877, the plaintiffs by an assignment under seal, subscribed by their president, made over all their interest in the note and suit to Heath's executor, "with full power to prosecute said suit in the name of said bank, and to collect and discharge the same in the name of said bank, at his own pleasure, expense and risk."

This is all there is of the case, and it discloses no tenable de-

* To same effect, *Nat. Pemberton Bk. v. Porter*, post, 266.

fense. It has long been settled in this State that the promisor upon negotiable paper cannot avoid judgment against him in a suit upon his broken contract merely upon the ground that the person or party in whose name the suit is brought or prosecuted has no interest in the enforcement of the promise.

Provided the promisor is not thereby deprived of any just and legal defense, or in any way defrauded or oppressed, he has no cause of complaint because his promise is construed, as it runs, to pay to the order of any person into whose hands it may lawfully fall. Our decisions fully authorize the maintenance of a suit for the benefit of the owner and by his order in the name of any person competent to give the debtor a discharge who consents to the use of his name as plaintiff in the action; and this even in cases where the owner or his agent has instituted the suit in the name of a nominal plaintiff without first getting his consent, provided the party whose name is thus used ratifies the act.

The point has been so often discussed and decided that any thing beyond a citation of the authorities must needs be regarded as useless and repetitious. *Marr v. Plummer*, 3 Me. 73; *Fisher v. Bradford*, 7 id. 28; *Golder v. Foss*, 43 id. 364; *Granite Bank v. Ellis*, id. 367; *Patten v. Moses*, 49 id. 255; *Demuth v. Cutler*, 50 id. 298; *Lime Rock Bank v. Macomber*, 29 id. 564.

According to the doctrine and practice in the cases first herein cited, a suit brought or prosecuted in the name of a nominal plaintiff would be subject to the same legal and equitable defenses (mere technicalities perhaps excepted) as if brought in the name of the real owner. But it is no defense to an action on a promissory note that the property in it is in a third person, unless the possession of the plaintiff is *mala fide*. *Guernsey v. Burns*, 25 Wend. 411. Or, in the words of our own court, unless there is evidence of fraud or oppression, or some corrupt or improper motive to take the case out of the general rule, which is declared in the cases first above cited. Now there is not a scintilla of evidence that this action could not have been maintained by Heath, or his executor, if he had taken up the note and withdrawn it from the bank prior to its commencement. It was competent for him to take it afterward and get himself subro-

gated to whatever rights by attachment the bank may have secured, provided they would consent. *Brewer v. Franklin Mill*, 42 N. H. 292; *Norton v. Soule*, 2 Me. 341.

The admission that the bank discounted the note for Heath deprives the suggestion, that their subsequent action in re-transferring the note and suit to his executor was *ultra vires*, of all semblance of force. Whatever a natural person might lawfully do in closing up a transaction respecting an overdue and protested note, the bank might do. *First Nat. Bank of Charlotte v. Nat. Exchange Bank of Baltimore*, 92 U. S. 122; *Thomp. N. B. Cas.* 124. It was competent for them to avoid the burden of this litigation, and secure for their stockholders the money due upon the note from any party who was liable to them upon it by just such a negotiation as this appears to have been. Nor does the payment by Heath's executor to the bank operate in any manner to discharge the contract or liability of the defendant.

Where suits are brought against the maker and indorser of a promissory note and the indorser pays the amount, and it is agreed between the holder and the indorser that the suit against the maker shall be prosecuted for the benefit of the indorser, the maker cannot avail himself of the payment by the indorser as a defense in the suit against him. *Mechanics' Bank v. Hazard*, 13 Johns. 353.

There is no reason why the indorser should not make the same arrangement before suit commenced against himself with like effect. See, also, on this point, *Jones v. Broadhurst*, 67 E. C. L. R. 173 (9 M. G. & Scott); *Randall v. Moon*, 74 E. C. L. R. 260 (12 C. B.); *Clason v. Morris*, 10 Johns. 524. And upon other matters incidentally arising in the case and not herein more particularly noticed, *Stevens v. Hill*, 29 Me. 133, 135. *Folger v. Chase*, 18 Pick. 63.

Defendant defaulted.

APPLETON, C. J., WALTON, DICKERSON, DANFORTH and PETERS, JJ., concurred.

Thomas v. Farmers' Bank of Maryland.

THOMAS V. FARMERS' BANK OF MARYLAND.

(46 Md. 43.)

Authority for National bank to sue in its old name as a State corporation.

A State statute authorizing the State banking institutions to become banking associations under the laws of the United States, and providing for the surrender and extinction of their State charter, and "that said bank, etc., may continue to use its corporate name for the purpose of protecting and defending suits instituted by or against it, and of enabling it to close its affairs, but not for the purpose of continuing under the laws of this State its business," etc., is not in conflict with the National Banking Act.

THE opinion states the case.

Frederick Stone and J. Shaaff Stockett, for appellant.

Alexander Randall, for appellees.

ALVEY, J. The Farmers' Bank of Maryland recovered judgment in the Circuit Court for St. Mary's county in 1864, for \$1250, against Henry W. Thomas and others. After the recovery of this judgment, the bank was converted into a National banking association, under the provisions of the act of Congress, entitled "An act to provide a National currency," etc., approved June 3, 1864 (U. S. R. S., § 5154, p. 1002), with the name and title of "The Farmers' National Bank of Annapolis." In addition to the authority for the conversion contained in the Currency Act, to which we have referred, the legislature of the State, by the act of 1865, ch. 144, expressly authorized the several banking institutions incorporated by the laws of the State to become banking associations under the laws of the United States; and by the third section of this act of 1865, provision is made for the surrender and extinction of the State charters of the banks so converted, with a *proviso*, "that said bank, savings institution or savings bank may continue to use its corporate name for the purpose of prosecuting and defending suits instituted by or against it, and of enabling it to close its affairs, but not for the purpose

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of continuing under the laws of this State the business for which it was established," etc. The conversion of the original plaintiff in the judgment from a State to a National bank took place in June, 1865, after the passage, and in pursuance of the act of the State authorizing the conversion, and in May, 1874, a *scire facias* was issued on the judgment against the original defendants, and certain terre-tenants of the lands which had belonged to the defendants at the time or since the rendition of the judgment; the plaintiff using its original corporate name, in which the judgment was recovered, instead of the name acquired under the law of the United States.

To this *scire facias*, various defenses were taken by two of the terre-tenants named in the writ; and among these defenses, the plea of *nul tiel record* was interposed, and also the plea of *nul tiel corporation*, or that the corporation named as the plaintiff in the writ had been dissolved, and its charter surrendered and abandoned.

As to the plea of *nul tiel record*, we understand the appellants as making no question on that in this court; and we therefore pass it over without further remark. But the question of the supposed disability of the appellee to sue by its former corporate name has been strongly urged by the appellants; and as it is preliminary to all other questions that can arise in the case, it is proper that it should be first decided. The question is raised by demurrer to the rejoinder by the defendants to the replication to the defendants' second plea.

1. It is laid down in 1 Bac. Abr. 33, as a settled principle in pleading, that if the existence of the person or corporation suing be denied, the plea is in bar; for if there be no such person or corporation, there is an end of the action; and this principle has been sanctioned by this court, in the case of the *Bank of Metropolis v. Orme*, 3 Gill. 444. But the question here is not whether the particular corporation recovering the judgment is still in existence, but whether there be competent authority delegated to the existing corporation, organized under the law of the United States, and by a name different from that derived from the State, to prosecute and defend suits in the name of the former

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corporation, that is to say, in the name of the corporation that recovered the original judgment?

By the fourth section of the act of 1865, ch. 144, it is declared that whenever any bank in this State shall have surrendered its charter, and become an association for the purpose of banking under the laws of the United States, all its assets, real and personal, *without other transfer*, shall vest in and become the property of such association, and that such association shall be responsible for all the debts and liabilities of said bank, incurred prior to the surrender of its charter. From the terms of this act, as well as those found in the act of Congress, it is manifest that by the act of conversion from a State into a National bank, all the assets of the former, including all judgments, were by operation of law transferred and assigned to the latter; and such being the case, it is clear that the present National bank would have the right to sue as assignee. But it was supposed that there might be suits depending, liable to abate, or judgments recovered remaining to be executed or reviewed, and where it would be convenient and proper that the proceedings should be carried on to final determination without the necessity of a change in the name of the party upon the record; and hence the *proviso* in the third section of the act of 1865, ch. 144.

It is however contended by the appellants, that because the act of Congress under which the bank was organized provides that each banking association shall have a proper corporate name, and expressly authorizes it to sue and be sued, complain and defend, in any court of law, or equity, as fully as a natural person could do, therefore the State law, authorizing the prosecution or defense in the name of the former corporation, is in conflict with the provisions of the act of Congress, and consequently void; that a National bank can only sue by its proper corporate name, and that it is not competent to the State to authorize it to sue by any other. To this general proposition we cannot assent. If this were an attempt to defeat the right of a National bank to sue in its proper corporate name, and to require it to sue in a name different from its own, as a condition upon which it would be allowed to maintain its suit, under State statute, in such case a

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real conflict would arise, and the State statute would have to yield to the right conferred by the United States law. But the statute of 1865, ch. 144, so far as the right to prosecute is involved, simply confers a privilege, and it is optional with the National bank either to prosecute in its proper corporate name, or in that allowed by the State law. It is certainly competent to the State to regulate the mode and manner of prosecuting suits in her own courts, and if such regulation does not hinder or impair the rights and powers conferred upon the bank by the law of the Union, it is not perceived upon what principle the State law should be denied its force and efficacy. These National banks, as Federal agencies, are only exempted from State legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the government of the United States. Any other rule, says the Supreme Court of the United States, in the case of the *National Bank v. Commonwealth*, 9 Wall. 362, Thomp. N. B. Cas. 34, would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. And in speaking of the dependence of the National banks upon the laws of the particular States where they may be located, the court, in the case referred to, declared that such banks are subject to the laws of the State, and are governed in their daily course of business far more by those laws than by the laws of the United States. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, *their right to collect their debts, and their liability to be sued for debts*, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We can perceive no possible conflict, therefore, between the act of 1865, ch. 144, and the act of Congress under which the National banks are organized. "The Farmers' National Bank of Annapolis" is in reality the party plaintiff in the present suit, though prosecuting in the name of the "Farmers' Bank of Maryland;"

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and if there be a judgment for the defendants, the substantial plaintiff will be liable for costs.

It follows that the judgment on the demurrer in favor of the plaintiff was properly entered.

Judgment reversed.

COUNTY COMMISSIONERS OF FREDERICK COUNTY V. FARMERS AND
MECHANICS' NATIONAL BANK OF FREDERICK.

(48 Md. 117.)

Assessment.

A State may tax the real property or the capital stock of a National bank, but not both. (*See note, p. 255.*)

THE case is stated in the opinion.

Charles J. M. Gwinn, attorney-general, for appellants.

Milton G. Urner and *I. Nevett Steele*, for appellee.

BARTOL, C. J. The appeal in this case is taken under the provisions of the act of 1876, ch. 260, providing for "the general valuation and assessment of property in this State."

"The appellee is a National bank located in Frederick county, organized under the laws of the United States. It has a capital stock of \$125,000, divided into 5,000 shares of the par value of \$25 each. A portion of the capital is invested in a lot of ground improved by a banking-house, such as is necessary for carrying on the banking business, and in furniture for the use of the bank."

"Its shares of capital stock were assessed under the act of 1876, at \$33 per share, to the respective owners thereof. In addition to the assessment of the capital stock to the shareholders, the assessors also assessed against the bank in its corporate name, the said lot of ground and improvements at \$5,000, and the furniture at \$100, which was so returned by the board of control and review to the county commissioners." On the petition of the ap-

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pellee, the Circuit Court ordered that the *banking-house, lot and furniture* be struck from the list, etc. From which order this appeal is taken.

The act of 1876 made it the duty of the assessors to value the shares of stock in any corporation at their full cash value. It must be presumed in this case that the valuation has been made by that standard, nothing appearing to the contrary. But this is not material to the present case.

The question presented by the appeal is, whether under the Constitution and laws of this State it is competent to assess, for the purposes of taxation, both the shares of the capital stock and the property held by the bank.

The objection urged on the part of the appellee is that the stock of the bank represents its whole property, and to tax both would be double taxation in plain violation of the 15th section of the declaration of rights. This is not a new question in this State, and a reference to the decided cases seems to us to set it at rest, without referring to decisions elsewhere.

In the *Tax* cases, 12 G. & J. 117, this question was fully argued by able counsel; no formal opinion was delivered by the court, but in the *syllabus* setting out the points decided, it is distinctly stated, as the judgment of the court, that "the property of a bank being represented by the shares of stock therein, both cannot be taxed, and therefore when the tax is imposed on the stock in the hands of shareholders, the property of the bank, real or personal, cannot also be taxed."

"The stock of the banks in Baltimore, in the hands of shareholders, was rightfully taxed, but the Appeal Tax Court erred in taxing the real and personal property of the same banks." By an examination of the facts of the case, in reference to which this proposition is stated, it clearly appears that this was the only question presented.

In *Gordon's Ex. v. M. & C. C. of B.*, 5 Gill, 231, the same proposition was distinctly affirmed. The court say (p. 236), "It is perfectly understood that the stock of a bank is the representative of its whole property, and when a tax has been laid on the stock in the hands of the shareholders, the real and personal estate

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of the company becomes exempt from taxation. To tax both the real and personal property, and the stock, would be a double tax, and therefore illegal and unjust.

So in *M. & C. C. of Balt. v. B. & O. R. R. Co.*, 6 Gill, 288, it was decided that the exemption from taxation of the shares of the capital stock of the railroad company, under its charter, carried with it the exemption of the property of the company, because for the purposes of taxation the former represented the latter. This construction of the charter of the railroad company has been affirmed by this court at the present term. *State v. B. & O. R. R. Co.*, 48 Md. 49.

In the *P. W. & B. R. R. Co. v. Bayless*, 2 Gill, 355, where the construction and effect of similar words of exemption in the charter of the appellant were considered, the same principle was decided.

We have recently affirmed the same doctrine in *State v. C. & P. R. R. Co.*, 40 Md. 51. Judge ALVEY, speaking for the court, says: "The capital stock of the several mining companies of the State is liable to taxation according to a fixed and certain rate, and the stock being the representative of the whole property of the corporation, the payment of the tax on the capital stock exempts from taxation all the property, both real and personal, of the company. And although the State may elect to tax either the capital stock of the real and personal property of the company, yet it cannot tax both. * * * *"

After these repeated decisions in this State, it would seem that the questions ought to be considered as no longer an open one in Maryland; whatever may have been the views entertained by courts and judges elsewhere.

It is unquestionably true that the property of a corporation does not belong to the shareholders; they are not the legal owners, but they have an equitable or beneficial interest therein.

It is held and managed for their use and benefit, and under their control and direction. It is not a mere metaphysical subtlety to say that the corporate property is represented by the shares of stock. It is substantially true, for a tax assessed on the property

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of the corporation is in reality imposed upon the shareholders, and is paid by them indirectly.

This subject is very well considered by the Supreme Court of Connecticut in *New Haven v. City Bank*, 31 Conn. 100, and in *Nichols v. N. H. & N. Co.*, 42 id. 103.

But it is unnecessary to repeat here the reasoning upon which this principle rests. It is too well settled in this State to be disturbed. Being of opinion that to tax the property of the bank and its capital stock at the same time would be double taxation, forbidden by our organic law, we cannot construe the act of 1876 as authorizing such double taxation. In the case of a corporation chartered by the State it could not be tolerated or enforced; and the appellee is entitled to be protected against such an exaction. Under the Revised Statutes of the United States, the State is left free to exercise the power of taxation of National banks, assessing the same upon the real property of the bank, or upon the shares of its capital stock, at the election of the State, in accordance with the requirements of our own Constitution and laws, and only in conformity with the rules applicable to the citizens and corporations of the State. *Van Allen v. Assessors*, 3 Wall. 585; *Thomp. N. B. Cas.* 1.

Order affirmed.

STEWART, J., dissented.

NOTE BY THE REPORTER.—In *City of Memphis v. Ensley*, 6 Baxt. 553; 32 Am. Rep. 532, it was held that stockholders in a moneyed corporation are liable to taxation on their shares, although the capital stock has also paid a tax. The court said:

"In this case the Gas-Light Company have all their capital stock invested in Gas Works Manufactory and other appurtenances necessary to the production and supply of gas. This property has been regularly assessed for taxes, and the same was paid. A tax, however, has been assessed on the shares of stock owned by the stockholders at their market value as part of the personal property of said stockholders, the stock being valued at fifty cents on

the dollar as the market value. It is now claimed that there is double taxation, on the ground that the tax on the capital stock as invested is a tax on the shares, and that this last tax cannot be collected by law. There is no contract in the case for exemption, but it stands on the naked question whether a tax on the capital stock is a tax on the stockholders, and we suppose it must also be assumed, to fully make out the defendant's case, that the tax on the capital stock is the same tax as the one imposed on the stockholders or shares of stock, and therefore is double taxation, or a tax levied twice on the same property. However, it may be that the last assumption may not necessarily be involved in the first.

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"We may say in advance that here we are not trammelled by the controlling influence of the Supreme Court of the United States, as a revisory court, should there be any conflict between the views of that court and our own, and may fully settle the question on the weight of authority and legal reason, as applied to the facts of the case.

"It is said this is a pure question of authority, but this is not true, as it is largely a question of fact, at least in one important aspect of it; that is, whether, in fact, a tax on the capital stock is a tax on the shares of the stock in such a sense as to be double taxation to tax both. We have no contract in this case to be construed by the actual or assumed intention of the legislature; on the proposition, as a matter of fact, we will give what hereafter appears to us to be the effect of such a tax on the capital stock, or a tax on the shares of stock. At present we look for the law of the case, so far as settled in our own State, and hastily refer to the views of some of our sister States.

"We have the case of *Union Bank v. State*, 9 Yerg. 490, in our own State, and if the case settles a definite rule on the subject, unless we can see high and controlling reasons to the contrary, we shall feel bound to follow it.

"In this case, by the act of 1836, a tax had been assessed on the capital stock, amounting to about \$190,000, at so much on each hundred dollars. It was agreed that the tax assessed was on the capital stock of the bank held by individuals, and that the bank was required to pay it. It appears from the statement of the case by the reporter, as well as from the opinion, that the stockholders presented their rights in the case.

"Judge TURLEY, in commencing the opinion, says: 'The question involves the taxing power of the State, the privileges of an incorporated constitution, and the rights of non-resident owners of our bank stock, and as appears also in the latter part of the opin-

ion, the liability of resident stockholders. This is correct, for the act fixing the tax levied it on shares of stocks, but required it to be collected from the bank on the amount of stock paid, and made it the duty of the cashier to list the amount of the stock owned in his bank by the several stockholders.' Under the agreed case, that if the bank was in any way liable, the court should render such judgments as the law warranted, the question of the liability of the shares of the stock was fairly before the court. The court clearly held in this case that under the provision in the charter of the bank, 'that in consideration of the privileges granted by the charter the bank agrees to pay annually the one-half of one per cent on the amount of the capital stock paid in by the stockholders other than the State,' the franchise, and the capital stock as necessary to the enjoyment of the franchise, could not be taxed, and to do so would impair the obligation of the contract. It also held that the shares of the stock owned by the State as individual property of the person owning it might be taxed, notwithstanding the exemption by contract of the capital stock, but that this must be done *ad valorem*, or upon its market value, under the Constitution of 1834.

"In this opinion Judge TURLEY states the view of the court on the question of the distinction between the capital stock and the shares of stock owned by individuals, saying it is a mistake to suppose that the stock of an individual consists of so much money owned by him in the bank. The money in the bank is the property of the institution to the ownership of which the stockholder has no more claim than a person has who is not at all connected with the bank. He then adds that the stockholder is the owner of his stock, and may transfer it at his pleasure, and that a tax on the shares is in the nature of a tax on income, he having previously defined bank stock to mean 'the individual interest of a

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party in the dividends as they are declared, and a right to a *pro rata* distribution of the effects of the bank on hand at the expiration of the charter.' If, then, the exemption of the capital stock did not exempt the shares of stock, it is clear that upon the reasoning of the court it must have been on the ground that they were not the same properties, and the one did not include the other.

"Such was the holding of the court, as we understand it, beyond all question. We are pressed to reverse or disregard this view in arguments of exceeding ingenuity as well as rare ability and learning.

"We have cheerfully examined the cases presented from the courts of our sister States, and their reasoning, and concede that in all of them urged upon our attention by counsel for their corporations, in which the direct question is presented, the doctrine is announced for which they contend with more or less distinctness, and in several of them with great force of reasoning. But we do not see that the reasoning is so clear and demonstrative as that we should overrule a well-considered opinion of our own court in a case which was argued by the first talent this State has produced, and decided by a court the equal of any in any sister State that has held a different view. The cases referred to, or some of them, are *Johnson v. Commonwealth*, 7 Dana, 363; *New Haven v. City Bank*, 31 Conn. 108; *State ex rel. Colt v. Power*, 4 Zab. 40; *State v. Brannum*, 3 id. 493, together with a number of others that need not here be noted. The question whether the tax on the capital stock is a tax on the shareholders or shares, and *e converso*, whether a tax on the shares is a tax on the capital stock, and the identity of the two things or properties is one of that character of questions in which so many elements of identity and also of diversity are presented as render it exceedingly difficult to say on which side is the preponderance. It is cer-

tainly true that the stockholder who pays his one hundred dollars to the corporation, and receives therefor a certificate of stock, has not thereby made himself the owner of one hundred dollars of money in the corporation, and also of one hundred dollars of property in stock, nor has the aggregate amount of money been increased by the operation. This is conceded. But then the certificate of stock does not, in fact, import that he owns the one hundred dollars in the bank. What then is the element of property or value in the share of stock? It is a chose in action, an intangible thing evidenced by writing, and certainly has a market value as such, subject to rise and fall under the influence of certain laws of trade, or rules that govern the market for the commodity more or less distinctly defined. Of these elements the leading one is the amount of dividend to be derived from the investment, and that arises from the prudent and skillful management of the institution and its business, together with inherent advantages for profitable use of the business itself. Without going into the various circumstances that may render the dividends large or small, it is certain that ordinarily their amount makes up the larger share of the value of the stock; the element of ultimate safety of the fund invested, and reimbursement at the termination of the corporation life, having comparatively little influence in fixing the market value of the stock in the larger number of cases. This being so, the dividends thus to be received by the holder, it seems to us, are the largest element of value which enter into this kind of property, and that on which a tax on the share is laid, and on which the burden falls directly, and when the stock is taxed at its market value, it bears a burden in proportion as the owner receives an income from it, and in this view it is a tax on income derived from stock to a greater extent than any other element of property in the thing

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taxed, but not on the money paid for the stock. This tax is not paid out of the capital stock, nor does it reduce its amount in the slightest. That remains in the bank when the stock is bank stock, and yields the precise amount of profit, and the same dividends are declared on it as if no tax were paid by the stockholders. It is true, the amount of this income or dividend in the hands of the stockholder is reduced to him on its value or amount, by the amount he is compelled to pay on it to the government as a tax; but this is what occurs in the value of all property subject to taxation. He owns the whole property in the dividend declared, but by reason of the ownership he owes the government a certain amount as a tax for his protection, which he must pay in common with every other citizen, but he pays it only on its real value, that is, mainly on the amount of income to be derived from it, or dividend to which he is entitled by reason of his ownership of the property.

"We think all this very clear, and therefore that the simple question in this aspect of the case is, whether a tax on income derived from property can be sustained where the property from which that income is derived has also paid a tax, whether the same in amount or not.

"In this case the capital stock has not paid the same amount of tax because it has paid *ad valorem* on the property at full value, and the stock is assessed at its market value, which is only fifty cents on the dollar, assuming that the property is worth more than fifty cents on the dollar of its cost. The idea suggested by the proposition thus announced suggests the consideration of the other aspect of the case — is the tax on the capital stock a tax on the shares? It must be admitted that this tax would lessen the amount of dividend on the shares to the extent it was paid, and the value of the share would, in a certain proportion, be diminished; but then the share is

not taxed at its face value, as representing or standing in the place of the capital stock paid in for it, but only at its market value, thus reduced by the fact that the income which it yields has been rendered less by the tax imposed on the property from which it is derived. If the stock is worth par, then, indeed, it would pay, if the rate of the tax was the same on the capital stock per share as that on the shares, the same sum in the way of taxes; if, however, the shares, as in some cases, were worth double the amount of dollars called for on their face, then it would pay this much more in proportion to its value; but this value would be made up of income, and the increased amount paid would be on the increased income paid by the owner. But if, again, the stock, say, was worth in the market only ten cents on the dollar, then the tax on the share would not be the same as that paid on the capital stock, if taxed on the amount paid in.

"Without further pursuing this line of argument, it suffices to say that the illustrations we have given show that there are elements of diversity between the capital stock and the shares to sustain the view of Judge TURLEY, that the same are two distinct properties, and though one be exempt by contract, yet the other is liable to be taxed; at any rate, there is nothing in the opposite view, we think, so preponderating as ought to induce us to overrule the opinion referred to. We might cite several cases referred to that seem to accord with this view but it would extend, this opinion already much longer than is desirable. It suffices to say, that the well-known cases of the National banks, their capital stock being in United States bonds, and exempt from taxation, yet the shares owned by the stockholders being held liable to State taxation, all go on this view of the question, and distinctly announce this theory, whether the cases rest entirely on it or not. As to any supposed danger of the destruction of the value

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of property or stocks by taxation, we need only say, that it is a property distributed among the people like other property, is not usually aggregated in large masses, or at any rate, at present has not reached that point in our State, and for its protection may be safely left to the sense of justice of the legislature and influence of the constituent on the representative. In addition, under our Constitution it can only be taxed as other property, according to its value. If it should ultimately grow into such large masses in the hands of the capitalists, in the future growth and development of the wealth and resources of the country, as to excite prejudices, no danger need be apprehended, as all history shows that capital has always been able to take care of and protect itself.

"We therefore conclude that the shareholders are liable to be taxed for their stock as owners of other property, regardless of the fact that the capital stock invested in the property of the company has been taxed, and has paid the tax."

The cases referred to in this case as hostile to its conclusions are, without exception, we believe, cases in which there was an exemption from taxation stipulated for in the charter.

In *State v. Brannin*, 3 Zab. 484, it is held that when an incorporated company is by its charter exempt from taxation, the stock of the company in the hands of the stockholders cannot be taxed, as it represents and is the title to the property of the company, and therefore is included in the exemption of its charter; but the stock of incorporated banks, although the bank pays a tax on its capital, may be taxed in the hands of stockholders, if authorized by the legislature, although it is a second tax upon the same property. Double taxation may be unequal, oppressive, and unjust; but it is not prohibited by any constitutional provision, and it is in the discretion of the legislature; and courts cannot declare

void a statute within the constitutional power of the legislature, because its operation may appear unjust or oppressive. To the first proposition are cited *Johnson v. Commonwealth*, 7 Dana, 342; *Tax Cases*, 12 G. & Johns. 117; *Gordon's Ear's v. Mayor of Baltimore*, 5 Gill, 266; *Smith v. Burley*, 9 N. H. 423. To the latter: *Providence Bank v. Billings*, 4 Pet. 568; *McCulloch v. State of Maryland*, 4 Wheat. 316; *Salem Iron Factory v. Danvers*, 10 Mass. 518; *Smith v. Burley*, 9 N. H. 423. The court say on the first point: "The terms of the contract on the part of the State are that no other tax or impost shall be levied or assessed upon the said company. Does this exemption extend to the interest of the individual stockholders in the property of the company? If this were a new question, I should have some difficulty in arriving at the conclusion that the shares of the individual stockholders were, by virtue of the contract, exempt from taxation, on the grounds that by the terms of the contract the exemption is strictly limited to the body corporate; that the property of the individual stockholder is not identical with the property of the corporation, and not within the terms of the exemption; that in a public grant nothing passes by implication, the contract in all cases of doubt being taken most strongly in favor of the public and against the grantee, and especially as the fact of giving such construction operates to limit the taxing power of the State." But the decision is rested upon that in *United States v. Appeal Tax Court*, 3 How. 183.

The latter case lays down the same doctrine. The court there said: "Does it exempt the respective capital stocks of the banks, as an aggregate, and the stockholders from being taxed as persons on account of their stock? We think it does both. The aggregate could not be taxed, without its having the same effect upon the parts that a tax upon the parts would have upon the

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whole. Besides, the legislature in proposing the terms and conditions of the act uses the word 'banks' with reference to the consent or acceptance of the act being given by the stockholders, according to a fundamental article of their charter. The acceptance of the act could only be made by the stockholders. They did accept, and the State recognized it as the act of the stockholders. It could not have been given or been recognized in any other way. True it is, when accepted and recognized, it became a contract with the banks. But its becoming a contract with the banks determines of itself nothing. We must look in what character or by whose assent it was to become a contract with the State, to ascertain the intention of the legislature in making the pledges, 'that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act.' " 'The act to be done in this instance was relative to the institution. The legislature knew it could only be done by the stockholders, and it uses the word 'banks' in reference to the act being accepted by the stockholders. The act was accepted by them. When therefore the legislature says, 'that upon any of the aforesaid banks accepting of and complying with the terms and conditions of this act, the faith of the State is hereby pledged not to impose any further tax or burden upon them during the continuance of their charters under this act; the relative is as broad as the antecedent, comprehending all that the latter referred to.'

In *Johnson v. Commonwealth*, 7 Dana, 342, a bank was required by its charter to pay to the State a bonus of twenty-five cents per annum on each share of stock, which might be increased to not exceeding fifty cents. This was held a

limitation of the taxing power, and an inviolable contract between the stockholders and the State. The court continued: "The power to augment the tax to as much as fifty cents is a power to tax the corporation only; whereby all stockholders, non-resident as well as resident, would be subjected to an equal burden. There is no power, reserved or resulting, to tax an individual stockholder, though he may reside within this Commonwealth. Such a tax would be unequal, and therefore unjust; and the power to impose it would be inconsistent with the object of the fifteenth section of the charter, which was to secure the stockholders against the consequences of unlimited and capricious taxation of their bank stock."

In *Tax Cases*, 12 Gill & Johns. 117, it was held that the property of a bank being represented by the shares of stock therein, both cannot be taxed, and therefore when the tax is imposed on the stock in the hands of shareholders, the property of the bank cannot also be taxed.

The like was held in *New Haven v. City Bank*, 31 Conn. 108. The court said: "We cannot, in the absence of explicit declarations to that effect, impute to the legislature an intention to provide merely that the shareholders should be individually exempt from taxation on account of their respective interests in the property of the bank, while it retained the power and right to assess and tax all or any portion of that property against the bank itself. Such reservation of right would render the promised exemption a worthless figment."

The doctrine of the principal case is well adjudged in the case of *State v. Brannin*, and the cases there cited, and has the approval of Burroughs and Cooley in their works on Taxation, although Angell and Ames state the contrary doctrine.

Lazear v. National Union Bank of Baltimore.

LAZEAR V. NATIONAL UNION BANK OF BALTIMORE.*

Usury — effect of, on contract — remedy for — power to purchase notes.

A guaranty of negotiable paper discounted by a National bank is not rendered void by the fact that the bank demanded and received usurious interest upon the notes.

No one can recover usurious interest paid to a National bank but the party who paid it, and it cannot be set off or recouped by another party to the paper.†

National banks have no power to purchase negotiable paper except from surplus capital.

ACTION on a guaranty. The opinion states the case.

GEASON, J. This suit was instituted on a written guaranty of the appellant to the appellee, which was executed on the 3d day of February, 1870, and is in the following words:

"For value received, I hereby guarantee to the National Union Bank of Maryland, at Baltimore, all liabilities to said bank of Lazear Brothers, now existing, or which may hereafter arise, to the extent of twenty-five thousand dollars, I hereby holding myself liable to said bank to that extent for all paper that may be held by the bank of Lazear Brothers, either as drawers or indorsers, in the same manner as if indorsed by me, I hereby waiving notice of protest of said paper."

The first question presented for our determination is, whether parol evidence is admissible to show that the guaranty was intended to cover only such paper as was received by Lazear Brothers from their customers, living out of Baltimore, and indorsed by Lazear Brothers and discounted by the bank, and such other paper drawn or indorsed by them as might be discounted *for the benefit* of Lazear Brothers by the bank.

[Omitting this discussion.]

It was contended that the guaranty is void, because usurious interest was demanded and received by the bank upon the notes now

* Not yet reported.

† See *Barnett v. Bank*, ante, p. 18; *National Bank v. Lewis*, post; *Hale v. McVey*, post; *Pritchett v. Mitchell*, 7 Kans. 355; S. C., 23 Am. Rep. 287, and note, 290; *Lamville County Bank v. Bingham*, 50 Vt. 105; S. C., 28 Am. Rep. 490, and note, 491.

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held by it, and the non-payment of which is the foundation of this suit. The United States Banking Law authorizes banks, organized under its provisions, to receive the same rate of interest that is allowed by the laws of the States in which such institutions are located, and no more, and provides that if more is demanded and received, the whole interest shall be forfeited, or that twice the amount of interest so paid may be recovered by the person paying it, or his legal representatives, provided suit for that purpose be brought within two years from the date of the usurious transaction. See chap. 3, §§ 5197 and 5198, U. S. Rev. Stat. There is no provision, however, declaring an usurious contract void. While as a general rule contracts which are in violation of the common or statute law are void, yet this rule does not apply to cases like the present.

In most of the States there are laws regulating the rate of interest; and yet we have been referred to no case and have found none in which a contract has been declared void, by reason of the fact that a greater interest than that allowed by law has been received under it, unless the law itself has provided that the taking of illegal interest shall render the contract void. This court, in the case of *Lester v. Howard Bank*, enforced the contract, notwithstanding the bank had made the loan to Purvis, its president, in violation of the terms of its charter, and in that case this court said: "Cases are to be found, arising under contracts made in violation of a statute, in the application to which of the general rule, courts have been governed by the plain and obvious purposes of the law; and in such it has been repeatedly held that an action would lie against a party receiving money under such a contract upon a promise implied by law to refund it."

In the case of *Fleckner v. U. S. Bank*, 8 Wheat. 355, Mr. Justice STORY, in delivering the opinion of the court, says: "The taking of interest by the bank beyond the sum authorized by the charter would doubtless be a violation of its charter, for which a remedy might be applied by the government; but as the act of Congress does not declare that it shall avoid the contract, it is not perceived how the original defendant could avail himself of this ground to defeat a recovery." See, also, *Bundel v. Isaac*, 13 Md. 224, to same effect.

We think it very clear that the demand and receipt by the bank of usurious interest upon the notes, offered in evidence, does not avoid the contract between the appellant and the appellee. There was therefore no error in the refusal to grant the third, fifth, fifth and a half, eighth, ninth and tenth prayers of the appellant, nor in refusing his motion to withdraw from the jury the notes which had been offered in evidence subject to exception.

But it was also contended that the usurious interest received by the bank upon the discount of paper upon which Lazear Brothers were drawers or indorsers, should be recouped or set off against the amount of the notes offered in evidence. It must be borne in mind that none of the paper of Lazear Brothers discounted by the bank was discounted for the benefit of the appellant, and that none of the usurious interest taken by the bank was paid by him. It was paid by Lazear Brothers and Shurtz & Co., and they, and not the appellant, have been the sufferers by the exaction of illegal interest. If the notes had been discounted at the rate of interest prescribed by law, the appellant would have been in no better situation than he is now, for if bound at all, he would have been liable for the amount of the notes, with legal interest thereon from the date of their maturity to the time of the trial of the case. But it has been frequently held that no one, except the party who has paid it, can recover the usurious interest paid. *Smith v. Exchange Bank of Pittsburg*, 26 Ohio St. 125; *Thomp. N. B. Cas.* 836; *Scott v. Leary*, 34 Md. 395, and *Hough v. Horsey*, 36 Md. 184. It will be found too that section 5198 of the Banking Act gives the remedy in such cases to the party who has paid the usurious interest, and to his legal representatives, provided they bring suit to recover it back within two years from the date of the usurious transaction. It was optional with the parties who paid it to the appellee to institute proceedings for that purpose or not, and they have not thought proper to do so within that time, and they are therefore now without remedy.

The Superior Court of Baltimore city was therefore right in excluding from the consideration of the jury the statement of the interest paid as set out in the third exception, and in rejecting the appellant's twelfth prayer.

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The appellant's seventh prayer is based upon the theory that the note of Lazear Brothers for five thousand dollars, dated June 22, 1872, which was obtained by the appellee from Winchester & Son, note and bill brokers, was not *discounted* but *purchased*; that such purchase was not authorized by the Banking Act, and consequently that the appellee obtained no title to the note, and was not entitled to recover upon it. Sub-section 7 of the act enumerates the powers which are conferred upon institutions, organized under the law, and provides that such institutions "shall have all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by *buying and selling exchange, coin and bullion*; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title."

A corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted. This rule of law is so well settled that we need refer to no other case than that of *Weckler v. First National Bank*, 42 Md. 591; s. c., 20 Am. Rep. 95; Thomp. N. B. Cas. 533. The only power to *buy and sell* with which National banks are clothed is the authority given by chapter 1, section 5137, sub-sections 1, 2, 3 and 4, to purchase real estate for the special purposes, and under the circumstances therein stated.

The act plainly shows that it was the intention of Congress to so limit and restrict National banks as to prevent them from exacting and receiving a greater rate of interest than is authorized by the laws of the States within which such institutions may be respectively located, and to prohibit them from becoming buyers and sellers of promissory notes. The evidence shows that Winchester & Son, note and bill brokers, were employed by Lazear Brothers to sell the note of June 22, 1872, to any purchasers willing to buy, and that it was sold to the appellees, over the counter of its banking-house, at nine per cent discount, for Lazear Brothers, the drawers, who received the proceeds of sale. None

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of the bank officers were informed that the Winchesters were acting for Lazear Brothers, nor were the latter told to whom the note had been sold. The note was sold to the bank on the 8th day of July, 1872. The president of the bank testified that the note in question was purchased by order of the board of directors, and that he had an impression, he believed, that Lazear Brothers were to get the proceeds of it. He further proved, that after customers of the bank were served, it sometimes invested its surplus funds in notes. We are of opinion that this transaction was an out-and-out purchase by the bank, and that such purchase was without authority, and that the bank acquired no title to the note, and cannot recover thereon in this suit. While we do not mean to say that a National bank may not invest its surplus *capital* in notes, we are of opinion that it has no authority to use such surplus funds, as may remain on hand from day to day, for the purpose of buying notes. *First National Bank of Rochester v. Pierson*, 24 Minn. 140; s. c., 31 Am. Rep. 341; Thomp. N. B. Cas. 637; *Farmers and Mechanics' Bank v. Baldwin*, 23 Minn. 198; s. c., 23 Am. Rep. 683; Thomp. N. B. Cas. 639. If any other construction were given to such a transaction as this the intention of Congress to prohibit National banks from buying and selling notes would be entirely defeated, and those institutions would be at perfect liberty to decline making discounts for their customers, and afterward to buy up the very paper, which had been offered for discount and refused, at such price as the banks might choose to give. The note of the 22d June, 1872, for five thousand dollars, was acquired by the appellee by *purchase* without authority to make such purchase, and it is not, therefore, entitled to the note, and cannot recover upon it, and the appellant's seventh prayer ought to have been granted.

The guaranty of the appellant is shown to have been executed by him, and accepted by the appellee, and the subsequent discounting of paper, of which Lazear Brothers were drawers, or which they had indorsed, furnished *prima facie* evidence that such discounts were made upon the faith of the guaranty. But such *prima facie* evidence may be rebutted by other proof offered

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by the guarantor, or by facts and circumstances put in evidence by the appellee.

Whether the money was parted with by the appellee on the faith of the guaranty or otherwise is a question exclusively for the determination of the jury, and there are some facts and circumstances appearing in the evidence as contained in the record, which should have been submitted to the consideration of the jury, whose duty it is to determine to what weight, if any, they are entitled. We are of opinion, therefore, that there was error in rejecting the appellant's fourteenth prayer. It follows from what we have said that there was also error in granting the appellee's modified prayer, because it permitted the jury to find for the appellee the amount of the five thousand dollar note after deducting the usurious interest received upon it, and also because it took from the jury the question whether the money obtained from the appellee had been loaned upon the faith of the guaranty.

The sixth and thirteenth prayers of the appellant were waived or abandoned at the argument of the case, and we need not refer to them further than to say that we think there was no error in rejecting them.

As there was error in rejecting the seventh and fourteenth prayers of the appellant, and in granting the modified prayer of the appellee, the judgment appealed from will be reversed and a new trial awarded.

Judgment reversed and new trial awarded.

NATIONAL PEMBERTON BANK V. PORTER.

(125 Mass. 333; 28 Am. Rep. 235.)

Action — promissory note — National bank as purchaser.

A National bank, having purchased a promissory note from an indorsee, brought an action thereon in its own name against an indorser; *held*, that the action was maintainable, whether the bank was by law authorized to acquire title to notes by purchase or not.

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ACTION on a promissory note. The plaintiff, a National bank, purchased the note from an indorsee. The defendant asked the judge to rule that the plaintiff had no power or authority, under the U. S. Stats. of June 3, 1864, §§ 6, 8, 30, 39, and the U. S. Rev. Stats., §§ 885, 3407, 5133-6, 5197, to purchase the note in suit, and therefore had no title to the note. The judge declined so to rule, and ordered a verdict for the plaintiff. The defendant excepted.

L. W. Howes, for defendant.

D. Saunders & C. G. Saunders, for plaintiff.

LORD, J. The plaintiff bank brings this action against the defendant as the indorser of a promissory note. The note is in the possession of the bank as the holder of it. The defense is, that the plaintiff purchased the note of one Benyon; that the plaintiff is a National bank; that a National bank has no authority to buy a promissory note; that the purchase of it was therefore *ultra vires*; and the conclusion of law which the defendant claims to be the legal result of these facts is that no action can be maintained upon the note by the bank. It is important that we do not confuse our ideas by the use of words, and it is therefore necessary to determine what is the exact contract in suit. The contract is in writing. In form it is a negotiable promissory note. Its legal effect is an absolute agreement on the part of the maker to pay to the payee, or to any indorsee of the instrument, a sum certain on a day certain; while it is also a conditional promise, on the part of the indorser to the indorsee, to pay the same sum upon the default of the maker and due notice to himself. In this case it is conceded that such condition has been performed or waived, so that the promise of the indorser has become absolute. On these points there is no controversy. The contract, therefore, in itself, is one which may lawfully exist between these parties. It is the precise contract which exists between the parties to every note discounted by a bank in the ordinary course of banking business which National banks are authorized to transact.

No claim is made that the promise was not made upon full consideration ; or that any fraud was practiced upon any party to the contract ; or that it has been paid ; or that any equities exist between the maker or any indorser and the holder ; or that under the form of lawful contract was concealed any usurious device ; so that the contract in itself has no taint of usury, of fraud or of illegality.

What is the contract which it is said is *ultra vires* ? Not the contract in suit, but another contract, to wit, the contract with Benyon, who is not in any sense a party to the contract in suit ; nor is it necessary to the maintenance of this action to connect him with it. The contract with Benyon, assuming such a contract to have been made, and for the purposes of this discussion, assuming it to have been *ultra vires*, is not executory ; this suit is not to enforce it ; but it has been fully and completely executed. It is true that the contract with Benyon was one of which the contract in suit was the subject-matter. The question then arises, can a party to a contract in itself lawful, and into which all the parties to it had authority to enter, be made null or be incapable of enforcement, because the plaintiff has entered into and fully performed, with another and totally distinct party, a contract in reference to it which was unauthorized, even though by such contract he becomes a party to the contract in suit ?

There is nothing of mystery or of sanctity in the use of the words of a dead language, *ultra vires* ; and although it is a concise and convenient form by which to indicate the unauthorized action of artificial persons with limited powers, still it is as applicable to individual as to corporate action. An illegal act of an individual is as really *ultra vires* as the unauthorized act of a corporation. We do not see in what respect there is any difference, in legal effect, between the obtaining of a note by an individual and by a corporation, if it be obtained wrongfully.

Applying the rule to a natural person, would it be a defense, by a maker of an unpaid promissory note, to prove that the plaintiff obtained the note in a fraudulent bargain ? or that the plaintiff took it from one not a party to it, in payment for intoxicating liquors illegally sold ? or that he took it from a third person in

discharge of a gaming debt, or in any transaction in which the person had no right to be engaged? These are all cases in which the party would acquire his title by transactions beyond his authority. These are questions which, under the law of this Commonwealth, it is not necessary to decide or consider.

In this Commonwealth, it is not necessary that the plaintiff in a suit upon a promissory note should have the legal title or beneficial interest in the note, nor indeed that he should have any title or any interest in it. Adjudications of this point, commencing with *Little v. Obrien*, 9 Mass. 423, are scattered through more than a hundred succeeding volumes of reports, embracing a period of about seventy years, have been unquestioned during all that time, and are daily recognized as the law of the Commonwealth. In *Little v. Obrien*, this very question of *ultra vires* was raised by the defendant, and both the questions, whether a contract with a corporation was *ultra vires*, and whether a plaintiff having no title could sue, were raised and elaborately argued for the defendant, by Mr. Story, who afterward and for so long a time adorned the bench of the Supreme Court of the United States. The cause was argued before that eminent magistrate, Chief Justice PARSONS, and his distinguished associates, Justices SEWALL and PARKER. In announcing the decision, the court uses this suggestive language: "Whether, for this misbehavior of the corporation, the government might not seize their franchises, upon due process, is a question not now before us." In *Chester Glass Co. v. Dewey*, 16 Mass. 94, there was a claim for goods sold and delivered to the defendant, and among other defenses was the defense that the sale of the goods was *ultra vires*; that by its charter, the plaintiff corporation was prohibited from engaging in such trade; and in addition it was also contended that the corporation never legally organized, and therefore had no existence as such. As to the last objection, it was said, that even if it existed, it would not be open to a member of the corporation, which had been in operation *de facto*, doing business for a number of years. In relation to the claim that the sale of goods was *ultra vires*, Chief Justice PARKER, after expressing a conviction that the sale as made was not a violation of the spirit and intention of the act of incorporation, adds,

"but the legislature may enforce the prohibition, by causing the charter to be revoked, when they shall determine that it has been abused." Without deeming it necessary to decide that these two cases are authority for saying that it is not open to an individual to raise the question whether a collateral act of a corporation is within its corporate power, it will be found, when that question is directly presented, that there are many decisions of courts which tend to that result.

In this Commonwealth, the only questions which are involved are, First, Has the plaintiff legal capacity to sue? Second, Is the plaintiff the holder of the negotiable note declared on? On neither of these questions can there in this case be any doubt. Even if it were necessary to show that the contract was one which the plaintiff is competent to hold, then as we have already seen, the contract is such a one; and the fact that the holder became possessed of it in the manner claimed is a wholly immaterial fact. To illustrate further the fact that it is not necessary that the plaintiff bank be the owner of the note in order that an action may be maintained upon it, suppose that this note had been discounted in the ordinary course of business, and the bank had filled the blank indorsement, as at any time it had authority to do, and as before judgment is entered it is proper to do, by writing over the indorser's name the words "Pay the within to the National Pemberton Bank," and under its authority to negotiate the note, had transferred it, without indorsement, for its full value, to a third party. Such third party could maintain an action upon it in the name of the present plaintiff, although the present plaintiff has no interest in it. Suppose for the sake of argument, that the plaintiff is not the *bona fide* holder of the note, within the meaning of that phrase when used in law in relation to the holder of a negotiable promissory note, what would be the result of such admission? Simply this, that any defense might be made to the note which could be made between any of the parties to it, as between one another; nothing more. But in this case there are no equities which could be pleaded to the notes in the hands of any party.

If the act of purchase was wholly unauthorized, the utmost legal

effect is that the transaction was wholly void, and Benyon is still the owner of the note. What then? The most that could be claimed is, that the bank receives the payment of it in trust for the real holder; precisely as it would, if it had recovered the amount, as in the case above supposed, after it had sold the note to a third person. With the equities between such parties, this defendant has no concern.

It is said that if this be the correct view of the law, the statute in relation to usurious contracts would be nullified; that a bank could say to a customer, "We cannot discount this note, but we will buy it," and thereupon does buy it, at a rate at which they were not authorized to discount it, and thus avoid the penalty of usury. Such result by no means follows. If in this case the intervention of Benyon were a mere device for the purpose of obtaining, as between the original parties to the note, a loan of money at a usurious rate of interest, the question presented would be a very different one. There is here no such claim or pretense. The amount given for the note was the face of the note, less the legal interest from the time of the alleged purchase to the maturity of the note. There are, however, other appropriate considerations in such case. The suit then must be between the parties to a wrongful contract still executory; and whether in such case the plaintiff would not be estopped to deny that such contract arose in any other mode than by discount, we need not discuss. It is quite sufficient to deal with questions as they arise, without speculating upon what would be the legal effect of a totally different condition of facts.

Two cases have arisen in Minnesota; one in 1876, *Farmers & Mechanics' Bank* (a State bank) v. *Baldwin*, the other in 1877, *First National Bank of Rochester* (which was a National bank) v. *Pierson*, Thomp. N. B. Cas. 637, in each of which it was decided that the plaintiff could not recover upon a promissory note purchased by it, because such purchase was *ultra vires*, and consequently conferred no title to the note. If we accept the result of these decisions, there is nothing in either of them in conflict with these views. By the law of Minnesota, no action can be maintained upon a chose in action, except by the real owner;

and as will be seen by reference to those decisions, respectively, the question which the court passed upon was whether the plaintiff acquired a title to the note in suit. In *Farmers & Mechanics' Bank v. Baldwin*, the discussion of the subject by the court is thus opened: "Inasmuch as the ownership of the note by plaintiff is put in issue by the pleadings, the question necessarily arises whether the plaintiff had the corporate power to make the purchase in the manner it did, and whether, by such alleged purchase, it acquired any title which it could enforce against either the maker, or Baldwin, the indorser." And the concluding paragraph of the opinion commences thus: "Having no corporate capacity to make the contract of purchase, the plaintiff never acquired any title to the note in suit." 23 Minn. 198. In *First National Bank of Rochester v. Pierson*, the ruling of the court below, which came before the Supreme Court for revision, as quoted by the judge who delivered the opinion, was "that the plaintiff, a National bank corporation, had no authority to purchase or traffic in promissory notes as choses in action, and did not in law acquire, by the supposed purchase, any title to the note in question, and cannot recover upon it in this action." The judge then, having previously referred to the fact found by the court below, that the plaintiff purchased the note, proceeds: "Upon the fact as thus found, it will be seen that the only question presented is, whether a National bank created," etc., "is authorized to deal in traffic in promissory notes, as a species of personal property, to acquire any title to such paper by a purchase." 24 Minn. It appears, therefore, that in those cases the only question raised was the question of title to the notes in the plaintiff; and that question, as we have seen, is in this Commonwealth wholly immaterial; for we have no such statute as the statute of Minnesota, requiring a suit to be brought in the name of the real owner of a chose in action, and it is the established law that the holder of a negotiable promissory note may bring suit upon it, whether in law or in fact he be or be not the real owner of it.

In *Rohrer v. Turrill*, 4 Minn. 407, the defense to an action on a promissory note was that the plaintiff was not the owner of the note, but had disposed of it to a third person in fraud of creditors.

Atlas National Bank v. Savery.

The court say that the fact that the plaintiff had disposed of the note to a third person is a complete defense to the action, and add that it is no concern of the defendant whether that disposition was fraudulent or not; as he had not paid the note, but owed it, it was not a matter for him to inquire by what arrangement it went into the hands of a third party; the actual transfer was to him a perfect defense; and the court cannot avoid suggesting the incongruity of the claim of the defendant that the title of the third party was fraudulently obtained, which, if competent, would simply show that such transfer passed no title, and that the suit was properly brought in the name of the plaintiff, who would be the real owner in such case.

We are therefore of opinion that there was no error in the refusal of the presiding justice to rule as requested by the defendant's counsel. The ruling asked was, upon the facts of the case, a wholly immaterial one, upon which the court was not called upon to make any ruling.

Exceptions overruled.

ATLAS NATIONAL BANK V. SAVERY.

(127 Mass. 75.)

Purchase of promissory note.

Assuming that a National bank cannot purchase notes, the contract of purchase is entirely independent of the executory contract which the plaintiff is seeking to enforce; and whether the plaintiff is holding the notes for itself or for another, is wholly immaterial to the defendant, unless it shall appear that it is holding them for some one who could not enforce them against the defendant, and such bank can maintain an action on such notes.

ACTION on three promissory notes, which the plaintiff bank purchased of a broker at its place of business, before maturity, at the then going rate of discount for first-class business paper.

The defendant requested the court to rule that the plaintiff under its corporate powers had no right to purchase these notes, but the

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court declined so to rule, and instructed the jury that a National bank has the right, under the power given to it by the act of Congress, to purchase a note in the manner in which these notes were purchased, and thereto the defendant excepted, and the plaintiff had judgment.

Morse, Stone & Greenough, for plaintiff.

Edward Avery, for defendant.

LORD, J. [Omitting other points.] The question as to the plaintiff's title to the notes is fully settled in the case of *National Pemberton Bank v. Porter*, 125 Mass. 333; s. c., 28 Am. Rep. 235; *ante*, p. 266, and with that decision we are satisfied. If we assume that a National bank cannot purchase a note, as claimed by the defendant, that contract of purchase is entirely independent of the executory contract which the plaintiff is seeking to enforce; and whether the plaintiff is holding the note for itself or for another is wholly immaterial to the defendant, unless it shall appear that it is holding it for some one who could not enforce it against the defendant, of which there was no evidence nor presumption, nor was the question made at the trial. The argument of the defendant's counsel was based upon the fallacy that the broker of whom the notes were obtained was the mere representative of law, of which, as we have said, there was no evidence, and the presumption, so far as there was any, was otherwise.

Exceptions overruled.

BALCH V. WILSON.

(25 Minn. 299.)

National bank — insolvent — set-off as against receiver.

The receiver of an insolvent National bank sued A. and B. on their joint note given to the bank. They claimed to set off notes given by the bank, and C. and D., who were also insolvent, as joint makers, to D. alone, and maturing after the receiver's appointment, and growing out of a distinct transaction from the note in suit. *Held*, not a proper set-off.

ACTION by a receiver of a National bank on a note. The opinion states the case. The plaintiff had judgment below.

Wilson & Lawrence, for appellants.

Atwater & Babcock, for respondent.

CORNELL, J. The note sued on was a joint note of the defendants given to the bank, dated on April 18, 1877, and payable one month after its date. The bank was put into the hands of the receiver, under the National Banking Law, on May 29, 1877, which was after the maturity of said note. Giving to the averments of the answer the most favorable construction claimed by defendants, the three several notes set up as a ground for the equitable relief sought, originated in the settlement of a transaction between the defendant Kimball alone and the bank and Tidd & Fales. Said notes were given to Kimball by the bank and Tidd & Fales, as joint makers, being dated April 16, 1877, and payable respectively in twelve, fifteen and eighteen months next thereafter, with interest. Neither of these notes were due at the time the receiver was appointed, nor were they or either of them due when this action was commenced, which appears to have been in November, 1877. It is alleged in the answer that the defendant Kimball transferred or assigned one-half of these notes to the defendant Wilson, prior to the commencement of this action, but whether before or after the appointment of the receiver is not stated. It cannot be assumed that Wilson acquired any interest in the notes prior to that time, as no such fact is alleged in the pleading. The insolvency of both the bank and Tidd & Fales, the other makers of the notes, is properly alleged. The further fact is alleged, though clearly an immaterial one in this action, that a claim for the amount of these notes has been duly made to the receiver, and disallowed. Upon this state of facts, the defendants ask that the plaintiff be estopped from collecting his demand against the defendants, and that so much of the defendants' demand as may be necessary be set off against that due to the bank in payment of the same, and for other and further relief as may seem just.

The respective rights and liabilities existing between the bank and its creditors and debtors became fixed when its insolvency occurred, and it passed into the hands of the receiver appointed by the Comptroller of the Currency. All the property and assets of the association then became a fund legally dedicated, first, to the satisfaction of any claim of the United States government for any deficiency in the proceeds of the bonds pledged for the redemption of its notes to meet the amount necessary to be expended for that purpose; and second, for a ratable distribution of the balance among its general creditors, upon the principle of equality. No subsequent lien could be created, or right or preference obtained, in respect to any of the assets or property of the bank which did not exist at that time. *National Bank v. Colby*, 21 Wall. 609, Thomp. N. B. Cas. 109. The rights of the parties hereto, then, must be determined with reference to the condition of things existing when the receiver herein was appointed; and unless the defendant Kimball, the then holder and owner of the notes against the bank, had at that time the equitable right of set-off here claimed, it is clear that it does not exist in favor of the defendants. *U. S. Trust Co. v. Harris*, 2 Bosw. 76; *Clark v. Brockway*, 3 Keyes, 13; *Matter of Middle District Bank*, 1 Paige, 585; *Clarke v. Hawkins*, 5 R. I. 219.

At that time the joint note of the defendants to the bank was overdue. If it had been paid at maturity according to its terms, the proceeds would have passed into the hands of the receiver as cash assets, subject, without doubt, to be equally and ratably distributed among the general creditors of the association, after settlement of the prior claim of the government according to the provisions of the National Banking Law. Kimball, the then owner of the claims against the bank, could not have acquired any preference over its other general creditors in respect to the moneys thus received by it on account of the payment of the note against the defendants. Their failure to pay it when due ought not to place them in any better position than they would have occupied had they faithfully discharged their own obligation at maturity, according to its terms. It would be a strange principle in equity which would enable a party to derive an advantage from

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his own delinquency which he could not otherwise have enjoyed. When the receiver was appointed, Kimball was the sole owner of the three notes against the bank, which are now sought to be used as an equitable off-set to its claim against the defendants. This claim was overdue. It was a joint one in favor of the bank against both defendants. It had no connection with the notes then belonging to Kimball, having originated in an entirely separate and distinct transaction. These notes were joint demands against the bank and Tidd & Fales, and not yet due. The respective claims being thus wholly independent of each other, and between different parties, they do not occupy the position of mutual demands between the same parties, originating in a mutual credit, and there was clearly no connection between them upon which, under any circumstances, a court of equity could act for the purpose of compelling an equitable off-set, or that would justify the application of any other rules in respect to the matter of set-off than those recognized at law. 2 Story's Eq. Jur., §§ 14-34 *et seq.*; *Birdsall v. Fisher*, 17 Minn. 100; *Greene v. Darling*, 5 Mason, 201.

The mere fact that the bank and Tidd & Fales became insolvent after giving their joint notes to Kimball could not operate to change the character or terms of these obligations, or hasten their maturity. Hence, if the due note sued on was the individual obligation of Kimball, this circumstance of insolvency alone would furnish no equitable ground for postponing its payment till the maturity of his notes against the bank, or for compelling an application of the former upon the latter in the way of set-off. *Bradley v. Angel*, 3 N. Y. 475. But in this case, the note due the bank was not the individual note of Kimball, but the joint note of both defendants, and certainly he had no right, when the receiver was appointed, to insist upon a suspension of the payment of such joint obligation, because he had individual claims against the bank and others, payable at a future day.

For these reasons, the demurrer to the answer was properly overruled, and the order appealed from is affirmed.

BALDWIN V. STATE NATIONAL BANK OF MINNEAPOLIS.

(1 North Western Reporter, 261.)

Transfer of stocks as security for loan.

The transfer to a National bank, as security for a loan, of stock of a corporation whose property is solely real estate, is not invalid within the National Banking Act, as a loan upon a mortgage security.

(Minnesota Supreme Court, 1879.)

THE opinion states the point.

Geo. Bradley, for respondent.

E. C. Palmer for appellant.

BERRY, J [Omitting immaterial points.] Another position taken in behalf of defendant is, that the plaintiff bank had no authority to "loan money upon mortgage security. From the case cited, we infer that this point has reference to the provisions of the National Banking Act, under which it is held incompetent for a National bank to loan money upon a mortgage of real estate. We are unable to see how these provisions can have any applicability to this case. The security here was stock, and although the property of the association, by which the stock was issued, was real estate, a pledge of the stock is in no sense, of which we can conceive, a mortgage of the real estate of such association. Upon a careful consideration of the evidence and findings in reference to the arrangement under which the plaintiffs were to surrender the stock in exchange for Northern Pacific railroad bonds, we are of opinion, without entering into details, that there is nothing which establishes any estoppel against the plaintiff, to call in question the deeds before mentioned.

City of Carthage v. First National Bank of Carthage, Missouri.

CITY OF CARTHAGE V. FIRST NATIONAL BANK OF CARTHAGE,
MISSOURI.**Taxation — license.*

A city has no power to exact a license fee from a National bank.
(Missouri Supreme Court, 1880.)

THE opinion states the case.

NORXON, J. By the record it appears that on the 27th day of September, 1876, complaint was filed before G. M. Robinson, city recorder of respondent, charging that appellant did set up, keep and carry on the business of banking within the corporate limits of said city, without first having obtained a license from said city of Carthage as a banker, contrary to the provisions of section 7 of ordinance No. 19, which section reads as follows, to wit: "No person or corporation shall be authorized to set up, keep, carry on or maintain the business of banking, money broker, or exchange dealer, either under or by virtue of the laws of the State or of the United States; nor shall any person or corporation set up, carry on, or maintain any savings association or institution, for the purpose of dealing in exchange or doing a banking or loan business within the limit of the city of Carthage, unless such person or corporation shall first obtain a license from said city as a banker, broker or exchange dealer."

On the trial of the cause before the city recorder, judgment for \$100 was rendered for plaintiff, and on appeal therefrom to the Common Pleas Court of Jasper county, defendant demurred to the complaint, on the ground that the ordinance on which it was based was void, for want of any authority in the general assembly to authorize its enactment, and because the ordinance imposed a tax on defendant. The demurrer was overruled and judgment rendered for plaintiff, from which defendant has appealed.

In the case of *McCulloch v. State of Maryland*, 4 Wheat. 316, it was held that Congress had the constitutional right to au-

* Not yet reported.

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thorize the incorporation of banks ; that a bank thus incorporated had a right to establish its offices of discount and deposit within any State, and that when so established the State could not tax it.

This decision was made with reference to the question whether the State of Maryland could impose a tax on the bank of the United States, incorporated under an act of Congress of April 10, 1816. The principle therein announced has been reaffirmed and applied to the act of Congress authorizing the incorporation of National banks, in the following cases: *Van Allen v. Assessors*, 3 Wall. 573; *Thomp. N. B. Cas.* 1; *Bradley v. People*, 4 Wall. 459; *Thomp. N. B. Cas.* 14; 9 Wall. 468; 19 id. 490; 23 id. 480.

In all of these cases it has been held that a State can only impose such a tax upon those National banking corporations as is authorized in the act of Congress creating them, and that said act only authorizes a tax on the shares in such bank and not upon its capital stock; that such banks derive their authority to do business in the States by virtue of United States statute which is supreme. It therefore follows, that the right of defendant to conduct its business as a banking institution is in no way dependent on a license to be obtained either from the State or any of its municipalities.

The demurrer ought to have been sustained and for the error committed in overruling it the judgment is reversed, in which all concur.

 SCOFIELD V. STATE NATIONAL BANK OF LINCOLN.

(9 Neb. 216; 31 Am. Rep. 412.)

Power to enforce mortgage.

A National bank, organized as successor to a State bank, may maintain an action to foreclose a mortgage of real estate executed to the State bank as security for a note, and assigned to it by the State bank on the formation of the National bank.

PETITION for injunction. The opinion states the facts. The petition was dismissed below.

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G. B. Scofield, for plaintiffs in error. National banks have no power to take deeds of trust or mortgages on real estate as security, and have no power not conferred by Congress. An injunction will be granted to prevent a sale by the bank of such mortgaged property. *Matthews v. Skinker*, 62 Mo. 329; s. c., 21 Am. Rep. 425; *Thomp. N. B. Cas.* 647; *Beaty v. Knowler*, 4 Pet. 152; *Wiley v. First Nat. Bank Brattleboro*, 47 Vt. 552; s. c., 19 Am. Rep. 122; *Thomp. N. B. Cas.* 905; *Fowler v. Scully*, 72 Penn. St. 468; s. c., 13 Am. Rep. 699; *Thomp. N. B. Cas.* 854; *McMaster v. Reid*, 1 Grant's Cas. 36.

E. F. Warren, for defendants in error.

MAXWELL, C. J. In the year 1878 the plaintiffs filed their petition in the District Court of Otoe county setting forth, in substance, that on or about the 5th day of August, 1871, Gilbert B. Scofield executed to the State Bank of Nebraska a promissory note for the sum of \$600 due January 1, 1872, and to secure the payment of the same himself and wife executed a mortgage upon certain real estate in Nebraska City; that on the 16th day of November, 1871, said State bank was organized as a National bank under the provisions of the act of Congress, approved June 3, 1864, and the amendments thereto; and that under and by virtue of said act of Congress the State National Bank was prohibited from purchasing, dealing or speculating in mortgage securities of any character or promissory notes unless taken to secure a debt contracted by the bank, or to prevent a loss upon a loan made by it after its organization; that about the 1st day of January, 1873, the State National Bank, through its officers, had assigned to it the note and mortgage hereinbefore mentioned; that said purchase and assignment were illegal and void so far as these plaintiffs are concerned, and that the plaintiffs are not now, and never have been, indebted to the State National Bank of Lincoln; that about the 3d day of April, 1875, the State National Bank of Lincoln commenced proceedings in the District Court of Otoe county to foreclose said mortgage, and that on or about the 8th day of December, 1876, a decree of foreclosure was rendered by the court in said cause, and the plaintiffs allege that the pro-

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ceedings of foreclosure and the decree are null and void; that the State National Bank was not the owner of said note and mortgage and had no lawful right to bring suit thereon; that the State Bank of Nebraska, before the pretended assignment of the note and mortgage, was indebted to the plaintiff, Gilbert B. Scofield, in the sum of \$833, which should have been applied as payment upon said note and mortgage; that upon said illegal and void foreclosure the State National Bank has obtained an order of sale and is about to sell said mortgaged premises, etc. The plaintiffs pray for an order restraining the defendants from proceeding under said order of sale, and that said decree of foreclosure may be set aside and held for naught, etc.

The defendants in their answer set up the decree of foreclosure, and allege that the plaintiffs appeared in that action and plead as a defense to the same the matters set up in the petition in this case, together with the set-off of \$833, and that said matters have been fully adjudicated and determined. The plaintiffs filed no reply to the answer but filed a motion for judgment on the pleadings. The motion was overruled and the case dismissed.

[Omitting minor matters.]

The plaintiffs lay much stress upon the act of Congress approved June 3, 1864, contending that a National bank is absolutely prohibited from purchasing notes secured by mortgage.

Section 28 of that act provides that: "It shall be lawful for any such association to purchase, hold and convey real estate as follows:

"First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by such association, or it shall purchase to secure debts due to said association.

"Such associations shall not purchase or hold real estate in any

other case, or for any other purpose than as specified in this section; nor shall it hold the possession of any real estate under mortgage, or hold the possession of any real estate, purchased to secure debts due to it, for a longer period than five years."

Section 46 provides "that any bank incorporated by special law, or any banking institution organized under a general law of any State, may, by authority of this act, become a National association under its provisions by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate and to change and convert the said bank or banking institution into a National association under this act * * * Provided, however, that no such association shall have a less capital than the amount prescribed for banking associations under this act."

It will be seen that the statute expressly provides that a State bank may organize as a National bank. That is, the National bank may become the successor of the State bank. In such case what would become of the assets of the State bank? The statute evidently intends that they shall be turned over to the new organization. If it were not so, no advantage would be gained by permitting a State bank to organize as a National bank. If the State bank was required to close up its own affairs, and collect its own notes, before the new organization could be perfected, the provisions of section 46 would be meaningless. In no case, however, can the amount of paid-up capital be less than is required by the statute. But suppose there was no authority under the statute to transfer the assets of the State Bank to the State National Bank, how will it avail the plaintiffs in this action? That the State National Bank was the owner of the note and mortgage in question at the time the decree of foreclosure was rendered, there is no doubt. The mortgage was the valid contract of the plaintiffs, made as security for the payment of money received by them. Did this contract become void by being transferred to the bank? If so, upon what principle? The statute

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does not declare such transfers void, and in our opinion, the bank may maintain an action to foreclose such mortgage. *National Bank v. Mattheos*, 8 Otto, 621; *ante*, p. 12. The motion for judgment on the pleadings was therefore properly overruled.

[Omitting a minor matter.]

Judgment affirmed.

RICH V. STATE NATIONAL BANK OF LINCOLN.

(7 Neb. 201; 20 Am. Rep. 322.)

Contract — by director when binding on bank — ratification — estoppel.

The president of the defendant bank informed the plaintiff that the bank was about to be reorganized, and that if he would act as a director, and his firm would continue to give the bank their business and use their influence in its behalf, they would give him ten shares of the stock. The plaintiff acceded, was elected and served as a director, and his firm continued to give the bank their business. *Held*, that the agreement to give the stock was valid, and enforceable against the bank.

ACTION for conversion of bank stock. The opinion states the facts. The defendant had judgment below.

Mason & Whedon, for plaintiff in error.

Brown, England & Brown, for defendant in error.

MAXWELL, J. The plaintiff brought an action in the District Court of Lancaster county against the defendant to recover the value of ten shares of the stock of the State National Bank, which, it is claimed, the defendant has wrongfully converted to its own use. The stock is alleged to be of the value of \$1,400. The defendant, in answer to the petition of the plaintiff, denied all the facts therein contained, except that the defendant was a corporation. On the trial of the cause, the court directed the jury to find a verdict for the defendant, to which the plaintiff excepted. The court, having overruled a motion for a new trial, rendered judgment dismissing the case. The case is brought into this court by petition in error.

On the trial of the cause the plaintiff, against the defendant's

objection, introduced in evidence a copy of the list of names and residences of shareholders of the State National Bank as it existed on the first Monday of July, 1874, from which it appeared that the plaintiff was credited at that time with ten shares of the stock of the bank.

It also appears in evidence that the plaintiff was elected one of the directors of the bank in January, 1874, and continued to act in that capacity until the following January.

Section 5146 of the Revised Statutes of the United States (Statutes at Large, vol. 23, p. 102) provides that "Every director must own, in his own right, at least ten shares of the capital stock of the association of which he is a director."

Section 5147 provides that "Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of the association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title; that he is the owner, in good faith, and in his own right, of the number of shares of stock required by this title, subscribed by him or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged as security for any loan or debt."

The plaintiff testified that in January, 1874, Owen, the president of the bank, sent for him and informed him that there would be a new organization of the bank. He states that he informed Owen that he did not think that Oppenheimer, of his firm, "would stay with the bank." Next day he was sent for again, and informed that *they* had concluded that if he would act as director of the bank, and give them all their business, as they had done before, and use their influence, they being one of the oldest firms in the city, and doing a heavy business with the bank, they would give him ten shares of their stock. That he told them that he would accept the proposition, and in pursuance of that agreement they had done all their business with the bank, and he had acted as director thereof. The witness also testified that he was informed there were no certificates of stock, and that it would be transferred on the books of the bank. He also testified that the

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business of the firm amounted to from \$60,000 to \$80,000 per year; that he never demanded his certificates of stock until after the failure of the firm of which he was a member; that at the time he made the demand the officers of the bank refused to deliver the same to him.

The agreement entered into by the plaintiff for the firm of which he was a member, with the president of the bank, appears to have been fully carried out on the part of his firm, and is a sufficient consideration to sustain the contract for the stock in question. The president was professing to act for the bank, and so far as appears, the bank ratified his action by receiving the benefits derived from the contract.

Under the circumstances developed by the testimony in this case, it may be that the bank is estopped from denying that the plaintiff is the owner of the stock in controversy, but as this question was not discussed on the argument, we will not examine it. The judgment of the District Court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

ON APPLICATION FOR REHEARING.

MAXWELL, J. [Omitting a matter of practice.] II. It is claimed that the court, in the decision of the case, overlooked important questions both of law and fact.

The action was brought to recover the *value* of ten shares of the stock of the State National Bank, claimed to be of the value of \$1,400, and which the plaintiff alleges the defendant unlawfully converted to its own use. As a general rule, the officers of a bank are held out to the public as having authority to act according to the usage and course of business of such institutions, and their acts, within the scope of their authority, bind the bank in favor of third persons having no knowledge to the contrary. *Minor v. Mechanics' Bank*, 1 Pet. 46; *Frankfort Bank v. Johnson*, 24 Me. 490; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Cook v. State National Bank*, 52 N. Y. 96; s. c., 11 Am. Rep. 667.

And it may also be laid down as a rule that no officer of a bank can bind it by a promise to pay a debt which the corporation does

not owe and was not liable to pay, unless the bank authorize or has ratified the act. *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Merchants' Bank v. Marine Bank*, 3 Gill, 97.

Section 36 of the act of Congress of June 3, 1864, provides that no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent a loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale, in default of which a receiver may be appointed to close up the business of the association.

Section 40 provides that "the president and cashier of every such association shall cause to be kept at all times a *full and correct list of the names and residences of all the shareholders* in the association, and the number of shares held by each, in the office where its business is transacted; and such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted, and a *copy of such list*, on the first Monday of July in each year, *verified by the oath of such president or cashier*, shall be transmitted to the Comptroller of the Currency."

Section 5 provides that associations for carrying on the business of banking may be formed by any number of persons *not less than five*.

A copy of the list of stockholders of the State National Bank in July, 1874, properly verified by the cashier, was introduced in evidence, from which it appears that the plaintiff at that time was credited on the books of the bank as being the owner of ten shares of stock. It also appears that nearly all the stockholders were directors of the association.

It is urged with great persistency that the defendant is not liable, because buying and selling the stock of the bank itself is no part of its business. It is true that the law does not permit banks to speculate on their stock, and only in certain contingencies are they permitted to purchase it. The law was evidently designed

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to guard the rights of the public by requiring those who appear on the books of the banks as owners to be so in fact; consequently the bank is prohibited from loaning money on the security of its shares under any circumstances. But it does not follow, where, as in this case, a bank has made or ratified a contract with a party to act as director and do his business with it, in consideration of receiving ten shares of stock, that after the bank has secured the benefits arising from the contract it cannot be enforced. This is not an action for specific performance, but for damages for the conversion of stock. The bank held the plaintiff out to the world as an owner of its stock, and thereby secured whatever credit might be derived from his character as a business man. As an owner of at least ten shares of its stock he was made one of its directors, and given a voice in the management of its affairs, with the tacit assent at least of its stockholders.

The law requires a director to take an oath that he is the *owner* of at least ten shares of stock, and also requires the president and cashier to make out a list of its stockholders on the first Monday of July in each year and verify the same by oath. Can the defendant now be permitted to say that its books were incorrect, and the oath of its officers false? I think not. The defendant is bound by its own record, and cannot be permitted to deny its correctness in the absence of fraud or mistake.

It is apparent from the testimony that the firm of which the plaintiff was a member had been in business for a number of years, and was transacting an extensive business. It is also disclosed that the firm was about to withdraw its business from the bank. In this condition of affairs the proposition was made by Owen to the plaintiff, and accepted by him, and the contract thus made was ratified by the defendant. This is certainly a sufficient consideration to entitle the plaintiff to recover. And counsel for the defendant admit that if the bank owned stock, and the president had authority to sell it, the consideration would be sufficient to uphold the sale. But it is claimed that he had no authority, unless specially authorized, to bind the bank in a contract of this kind.

In *Kennedy v. Otoe County National Bank*, 7 Neb. 59, it was

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held that the president of a bank, like other agents, could bind his principal only while acting within the scope of his authority, unless his acts were ratified.* And in this case, so far as the record discloses, Owen had no original authority to enter into the contract with the plaintiff; but it is apparent that the contract thus made was accepted and ratified by the bank. The ratification is equivalent to original authority to act in the matter which has been ratified; and the same rule applies to corporations which is applied to natural persons. *Fleckner v. United States Bank*, 8 Wheat. 363; *Essex T. C. v. Collins*, 8 Mass. 299; *Hayden v. Middlesex Turn. Co.*, 10 id. 403; *Salem Bank v. Gloucester Bank*, 17 id. 28; *White v. Westport Manufacturing Co.*, 1 Pick. 220; *Bulkley v. Derby Fishing Co.*, 2 Conn. 252; *Witte v. Derby F. Co.*, id. 260; *Hoyt v. Thompson*, 19 N. Y. 207; *Peterson v. The Mayor*, 17 id. 449; *Baker v. Cotter*, 45 Me. 236; *Church v. Sterling*, 16 Conn. 388; *Bank of Penn. v. Reed*, 1 W. & S. 101; *Hayward v. Pilgrim Society*, 21 Pick. 270; *Despatch Line of Packets v. Bellamy Manufacturing Co.*, 12 N. H. 205; *Planters' Bank v. Sharp*, 4 S. & M. 75; *Burrill v. Nahant Bank*, 2 Metc. 167; *Walworth County Bank v. Farmers' L. & T. Co.*, 16 Wis. 629.

After a careful re-examination of the entire case, it is apparent that no question, either of law or fact, has been overlooked in its determination. The application to file the motion for a rehearing is, therefore, denied.

Judgment accordingly.

* In that case, I., the president of a National bank in Nebraska City, obtained from K., in the city of Omaha, his promissory note for the sum of \$2,000 payable to I., or order, and payable on demand, for the purpose of purchasing stock in the bank of which he was president. I. procured the note to be discounted by his bank, and had the proceeds thereof placed to his credit therein, and he afterward drew the same out by checks on the bank. None of the officers of the bank, except the president, were aware of the character of the note, or that it had been given for stock. *Held*, in an action on the note, that the bank was entitled to recover. Also, that representations of the president of a bank, made in transacting its business, are admissible in evidence against the bank; but statements made by him away from the bank, in reference to matters in which the bank has no interest, are not admissible.—*RAP.*

State, North Ward National Bank, pros., v. Newark.

STATE, NORTH WARD NATIONAL BANK, pros., v. NEWARK.

(11 Vroom, 659.)

Mode of assessment.

An assessment of tax on the stock of a National bank in New Jersey, owned by a stockholder residing in the city where the bank is located, cannot be sustained by the presumption that the stockholder resided in the ward in which the bank was located, but the assessment must be made against the stockholder.

COURT of Errors and Appeals, in error to the Supreme Court.
For opinion of Supreme Court, see 10 Vroom, 380 ; Thomp.
N. B. Cas. 672.

Joseph Coult, for plaintiff in error.

Henry Young, for defendants in error.

THE CHANCELLOR: The proceedings in this case bring up for review a judgment of the Supreme Court upon a *certiorari* in a matter of taxation, the assessment in 1876, of the tax on all the shares of the capital stock of the North Ward National Bank of Newark, to the bank itself, notwithstanding the fact that some of its stockholders were residents of this State. This method of assessment is undeniably in contravention of the express provisions of the supplement of April 1st, 1869, to the tax law of the State (Rev. p. 1160, § 99), so far as the stockholders who reside in this State are concerned. That supplement provides that every person shall be assessed in the township or ward where he resides, for all shares of the stock of any National bank in this State, or of any bank authorized under the laws of this State, owned by him, or in his possession or control as trustee, guardian, executor, or administrator; and in case such owner, trustee, guardian, executor, or administrator shall be a non-resident of this State, then, and in that case, such banks shall be assessed to the amount of such shares so owned or held by non-residents, in the manner provided by statute in the case of other corporations. The assessment, however, was not based on that act, but on the sixteenth and sev-

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enteenth sections of the act of 1866. That section, indeed, was repealed by the act of 1869, but the defendants in error claim that as to the city of Newark, it was substantially re-enacted by a supplement to an act relating to the assessment and revision of taxation in the city of Newark, approved in 1872 (Pamph. L., p. 1165), by which the sixteenth and seventeenth sections of the law of 1866 were declared to be in full force and effect, so far as related to that city. Those sections provided for the assessment of tax on the stock of banks to the stockholders in their respective townships or wards where the banks were located, and made it the duty of the banks to retain and pay the tax assessed to each stockholder out of the dividends, and make the tax a lien on the stock of the stockholder, and provided that it might be levied on and sold for the tax. Pamph. L., p. 1085. The provision of the Constitution of this State, as amended, that "property shall be assessed for taxes under general laws and by uniform rules, according to its true value," was fatal to the special provision of the supplement to the Newark tax law. It, *proprio vigore*, repealed it, and thereupon the law of 1869 became the rule of taxation of bank stocks in Newark.

The assessment upon the bank of the tax on the shares of resident stockholders can therefore derive no support from the act of 1872. The Supreme Court so held, but while it so adjudged, it sustained the assessment as to all stockholders who resided in Newark when it was made, on the ground that they were taxable for their stock at their places of residence, and it did not appear but that they all resided in the ward in which the bank was located. This reason appears to me to be entirely insufficient to excuse what is an undoubted departure from the plain provisions of the law — a departure substantially affecting the rights of the stockholders. By the Revised Statutes of the United States, p. 1015, § 5219, it is provided that nothing therein shall prevent all the shares in any National banking association from being included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by authority of the State within which the association is located; but that the legislature of each State may direct the manner and places of tax-

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ing all the shares of National banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. The States, then, have the power to tax the stock of any National banking association in such manner and at such places as their legislatures may direct, subject to the restrictions above mentioned, as to discrimination against them, and the place at which shares of non-residents shall be taxed. The act of 1869, of the legislature of this State, directs in what manner and at what place the taxation of the shares of the stock of the National banks in this State shall be imposed.

Every stockholder resident here is to be assessed for his shares in the township or ward where he resides. Incidental to this taxation is his right to a deduction in respect of debts *bona fide* due and owing from him to creditors residing within this State. This right is liable to be affected by assessing his stock against the bank. He would be deprived of it entirely, if all his property were in the stock. But it is enough to say that it is his right, under the law, to have the assessment of tax upon his property, held in his own name, made against himself, and it cannot lawfully be made against any one else.

The bank, too, has rights in the premises. If the tax is illegally assessed against it, and it pays it, it cannot recover it from the stockholders. The payment would be an unjustifiable use of the funds of the bank. Nor can the suggestion, that in the case under consideration, it does not appear that the Newark stockholders, as to whose stock the assessment has been sustained, do not reside in the ward in which the bank is located, avail to support the assessment as to that stock. The assessment is not against them at all, but against the bank. The intendment is not introduced to support an assessment against the shareholder, but an assessment of his property against another person, and it is no more available to sustain the assessment when made against

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the bank, than it would have been had it been made against a stranger to him, residing anywhere in Newark.

The plaintiff in error insists that the assessment against the bank, so far as the shares of non-resident stockholders are concerned, should also be set aside, because of the injustice which it works against the resident stockholders, who, it is argued, will thus, if the assessment be sustained, be compelled by law to pay tax on their own stock, and also to pay their proportion of the tax on the shares of the non-resident stockholders. But in the first place, the injustice apprehended would not exist, for the bank may recover from the non-resident stockholder the tax, which, under the law, it is compelled to pay for him. And again, it is enough to say, that if the injustice would indeed exist, that would not be a sufficient reason for refusal to execute the law. The legislature has declared that the tax on the shares of non-resident stockholders shall be assessed against and paid by the bank; if this were, in fact, unjust to the resident stockholders, that consideration would not avail to induce this court to refuse to recognize the validity of the law. The remedy for the injustice would be with the legislature. *State v. Branin*, 3 Zab. 484, 494, 495.

I am of opinion, that for the error as to the assessment against the bank for the shares of stockholders resident in Newark, the judgment should be reversed.

For affirmance—DIXON, WALES, 2.

For reversal—THE CHANCELLOR, CHIEF JUSTICE, KNAPP, REED, WOODHULL, DODD, GREEN, LILLY, 8.

GRAHAM V. NATIONAL BANK OF NEW YORK.

(22 N. J. Eq. 804.)

Mortgage — power to take.

A mortgage to a National bank, to secure a present loan by the discount of commercial paper in the usual course of business, is not void, but only voidable at the election of the government.

IN the Court of Errors and Appeals, on appeal from the Vice-Chancellor. Foreclosure of real estate mortgages given to a National bank to secure the payment of notes on which the bank lent money at the time. The complainant had judgment.

Eugene Stevenson, for appellants.

Wm. H. Morrow, for respondents.

SOUDEK, J. The single question presented to the court on appeal is, whether a bank formed under the act of Congress, authorizing associations for carrying on the business of banking, can legally loan money by taking, as security therefor, a mortgage on real estate. Other defenses that were made in the court below have been abandoned here, and this question alone is presented for our determination. The exact position of the defendants, as set out in their answer to the bill to foreclose the mortgage in controversy, is that the mortgage to the complainant was, in its inception, void under the provisions of section 5137 of the Revised Statutes of the United States. This section enacts, that "a National banking association may purchase, hold and convey real estate for the following purposes, and no others." The two purposes that might be claimed to cover this mortgage are, "second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted," "third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings."

It is obvious that these loans were made by the bank on the security of these two separate mortgages, and that the making of the notes, the payment of the money by checks, and the delivery of the mortgages, duly executed as security therefor, were concurrent acts. They were not, therefore, given as security for debts previously contracted, nor were the mortgaged premises conveyed in satisfaction of debts previously contracted in the course of the dealings of the bank.

These cases, therefore, stand without the authority of the statute to purchase and hold real estate for such purpose. Each mortgage was given as security for a concurrent loan of money by

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discounting commercial paper. The case has been well argued by the counsel for the appellants, on the ground that contracts forbidden by statute are void, and that courts will refuse to enforce such contracts from regard to the law itself, and without reference to any equities between the parties. A like argument has been successfully presented in some reported cases, and some courts of high authority have held that such mortgages given as security for debts contracted at the time, or for future advances, are invalid, and not enforceable at law or in equity, because of the alleged prohibition of the statute. *Crooker v. Whitney*, 71 N. Y. 161; s. c., Thomp. N. B. Cas. 745; *Fowler v. Scully*, 72 Penn. St. 456; s. c., 13 Am. Rep. 699; Thomp. N. B. Cas. 854; *Ripley v. Harris*, 3 Biss. 199; *Kansas Valley Bank v. Rowell*, 2 Dill. 371; s. c., Thomp. N. B. Cas. 254; *Woods v. People's Nat. Bank of Pittsburgh*, 88 Penn. St. 57; s. c., Thomp. N. B. Cas. 888; 1 Jones on Mort. (2d. ed.), § 134.

But we are spared an examination of these cases, and others with like conclusions, and the reasoning upon which they are based, for a late decision in the Supreme Court of the United States has given a construction of this statute, and has authoritatively determined the validity of mortgages like these in controversy.

In *National Bank v. Matthews*, 8 Otto, 621 (*ante*, p. 12), §§ 5136 and 5137 were construed in their application to a deed of trust of lands with power of sale of like effect with a mortgage, assigned to a National bank as security for a loan of money to the holder. The conclusion was, that where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. The court cites, with approval, the high authority of Chancellor KENT, in *Silver Lake Bank v. North*, 4 Johns. Ch. 370, where similar terms in a statute were construed. The bank, in this ruling case, directed the trustee named in the bill of trust to sell, and on bill to enjoin the sale, the question of the validity of the security was raised. It is therefore an express authority upon the defense here raised on the bill to foreclose the mortgages to the bank.

The decrees in both cases will be affirmed, with costs.

Decrees unanimously affirmed.

STAFFORD NATIONAL BANK v. DOVER.*

Reserve surplus taxable.

The surplus fund which a National bank is required to reserve from its net profits is not excluded in the valuation of its shares for taxation.

(Supreme Court of New Hampshire, 1878.)

PETITION for abatement of tax.

Hobbs, for plaintiff.

Hall, for defendant.

DOE, C. J. The surplus fund which a National bank is required by U. S. Gen. Stat., § 5199, to reserve from its net profits, is not excluded in the valuation of its shares for taxation. *First National Bank v. Peterborough*, 56 N. H. 38; *Thomp. N. B. Cas.* 658; *Nat. Bank v. Com.*, 9 Wall. 353; *Thomp. N. B. Cas.* 34; *People v. Com'rs*, 67 N. Y.; s. o., 94 U. S. 415.

Petition denied.

 YERKES v. NATIONAL BANK OF PORT JERVIS.

(69 N. Y. 383; 25 Am. Rep. 206.)

Agreement to exchange bonds — banking powers.

A National bank held, as depositary, United States bonds belonging to plaintiff; in the spring of 1869, its cashier, for a sufficient consideration, agreed with the plaintiff to exchange them for registered bonds; the bank neglected to make the exchange, and in the fall of that year the bonds were stolen. *Held*, that the bank was liable for their value. †

ACTION to recover United States bonds, which defendant had refused to deliver upon demand. The plaintiff was a customer of and depositor with the defendant; the banks had several times bought government bonds for her, retaining them, collecting the interest, and crediting her with it in her deposit account.

* To appear in 58th N. H.

† See *contra*, *First Nat. Bk. of Allentown v. Hoch*, post.

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In the spring of 1869, defendant's cashier, for a sufficient consideration, agreed with the plaintiff to exchange these bonds for registered bonds. This was not done, and in November, 1869, the bonds were stolen by burglars from defendant's banking-house. Judgment for plaintiff on verdict was affirmed by the General Term of the Supreme Court, and defendant appealed.

Lewis D. Carr, for defendant.

D. D. McKoon, for plaintiff.

EARL, J. There was competent evidence tending to prove that the defendant agreed with the plaintiff for a sufficient consideration to exchange her bonds then in its custody for registered bonds, and the judge presiding at the trial submitted this evidence to the jury, and charged them that if they found the agreement was made, the plaintiff was entitled to their verdict. Whether this charge was correct is the sole question for our consideration.

The counsel for the appellant argued with much ability that the defendant had no corporate power to make such an agreement, and that its cashier had no authority to bind it by such an agreement, but he failed to convince us of either position.

Business corporations have such powers as are expressly conferred upon them by their charters, and such other incidental powers not prohibited as are proper, usual and necessary for the conduct of their corporate business. The defendant was organized as a National bank under the Banking Act of Congress. The general purpose of its organization was "for carrying on the business of banking." It had all the powers, except as prohibited by law, usually exercised by corporations engaged in such business, and properly incident thereto. It was expressly authorized (U. S. R. S., § 5136) to exercise "all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes." While the statute specifies the main things a National bank may do, it does

not undertake to specify all, and it does not prohibit all not specified. There is a large branch of banking business not particularly specified — that of collecting notes, checks, bills of exchange and other evidences of debt, for other persons. This forms a large share of the business of nearly all banks. They have correspondents and business connections which enable them to reach all parts of the country, and they have facilities and arrangements which enable them to do it with economy and dispatch. They take evidences of debt from their customers and other persons, and send them to distant places for collection, and pay over the proceeds when realized to the persons entitled, retaining or receiving in some form a compensation or benefit for the service. It has never been doubted that they have the right and power to do this kind of business as forming a legitimate part of banking business. If included under any specification contained in the statute, it is under that of "negotiating promissory notes, drafts, bills of exchange, and other evidences of debt." To negotiate, means, among other things, "to transfer, to sell, to pass, to procure by mutual intercourse and agreement with another, to arrange for, to settle by dealing and management." Webster's Dic. This power is absolutely essential to the business of the country, and if necessary to uphold it, it may be found in the specification alluded to. A bank in doing this business does not take title to the paper left with it for collection. It is a bailee for hire, and simply undertakes to use ordinary diligence in making the collection. It receives its compensation either by commissions charged or incidental benefits received. But suppose a bank instead of transmitting a note to be collected in money, transmits it for the purpose of procuring a renewal note, or for the purpose of getting additional security, or for the purpose of exchanging it for other securities; would the business then be such as it had no power to contract? Can it be claimed that a bank may transmit evidences of debt to be paid in money, while it has no power to transmit them to be renewed, or secured, or exchanged? It certainly cannot be successfully. The power in each case is of the same kind, and must rest upon the same general basis.

In this case, if the plaintiff had delivered her bonds to the

bank for collection, and the bank had agreed to collect them, no one would deny that the agreement would have been valid. If, after such an agreement, the bank had kept the bonds for an unreasonable time, until they were stolen, or had lost them, or rendered them worthless by its culpable negligence, it would have become liable to the plaintiff for their value. *Smedes v. Utica Bank*, Johns. 372; s. c., 3 Cow. 662; *Bank of Utica v. McKinster*, 11 Wend. 473; *Walker v. Bank of the State of N. Y.*, 9 N. Y. 582; *Montgomery Co. Bank v. Albany City Bank*, 7 id. 459. Instead of agreeing to collect these bonds, the defendant agreed to send them to the Secretary of the Treasury, and exchange them for registered bonds (U. S. R. S., § 3706), and for reasons above stated it had the same power to do this as it would have had to collect them. The exchange of the bonds would in a broad sense have been a negotiation of them. It would, as commonly understood, have been a legitimate business for a bank to do. We may take judicial notice of the fact that government bonds are usually bought and sold through banks, and that all the transactions in reference to them with the government are usually conducted through banks and persons doing banking business. They are moneyed securities, and the collection or exchange of them is a financial transaction in no sense foreign to the business of banking.

Having thus reached the conclusion that the defendant had corporate power to make this agreement, it will not be denied that the cashier acting for the bank, and clothed with power to manage its ordinary business, bound the bank.

While I am not aware of any authority in conflict with the views above expressed, they are sanctioned by authority which we ought to respect. In the case of *Leach v. Hale*, 31 Iowa, 69; s. c., 7 Am. Rep. 112; Thomp. N. B. Cas. 466, there was a similar agreement by the cashier of a National bank for the conversion or exchange of bonds, and it was held that it was within the scope of the power of the bank to do a general banking business. In *Van Leuven v. First National Bank*, 54 N. Y. 671; Thomp. N. B. Cas. 724, it was held that a National bank can properly and legally engage in the business of dealing in and exchanging

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government securities. In that case the president of the bank agreed with the plaintiff to take his 7-30 notes and exchange them for 5-20 bonds. The notes were converted to his own use by the president and the plaintiff sued the bank for their value. It defended upon two grounds, first, that the transaction was with the president individually, and not with the bank; second, that the bank was not authorized to make the agreement or do the business. A majority of the commissioners held that upon the undisputed evidence the agreement was made with the bank. Commissioners REYNOLDS and JOHNSON held that the evidence, as to whether the agreement was with the bank or with its president individually, should have been submitted to the jury. But all the commissioners agreed that the bank had corporate power to make the agreement. The point that it had not was taken at the trial, argued before the Commission, and considered and decided by it.

We therefore reach the conclusion, both upon principle and authority, that the defendant was bound, by the agreement found in this case, to exchange the bonds.

We have considered the exceptions to the rulings of the court upon objections to evidence, and find that none of them are well founded.

This case is distinguishable from the cases where bonds have been left with banks as special deposits, to be kept gratuitously for the owners. It is unnecessary to consider here what responsibility, if any, a bank incurs in such a case.

The judgment must therefore be affirmed with costs.

All concur ANDREWS, FOLGER and RAPALLO, JJ., concurring in result.

Judgment affirmed.

THIRD NATIONAL BANK V. BLAKE.

(73 N. Y. 280.)

Indorsement by married woman charging her estate — not a mortgage.

An indorsement by a married woman, expressly charging her estate with the payment of the note, is such a security as a National bank may take.

ACTION on a note against the indorser, a married woman. The opinion states the point. The plaintiff had judgment below.

Bowen, Rogers & Locke, for appellant. The indorsement by the appellant was a mortgage, and was within the prohibition of the statute creating National banks, and plaintiff cannot recover. *Fowler v. Scully*, 72 Penn. St. 456; s. c., 13 Am. Rep. 699; Thomp. N. B. Cas. 854; *Kan. Val. National Bank v. Milo*, 2 Dill. 371; Thomp. N. B. Cas. 264.

Geo. Gorham, for respondent.

EARL, J. Judgment was recovered in this action against both defendants upon a note made by the defendant Clarence A. Blake, and indorsed by his wife, the other defendant, in the following form: "I hereby charge my separate and personal estate for the payment of the within note." It is now claimed by the wife that the judgment should be reversed, upon two grounds, which may be separately considered.

First. It is said that the indorsement became a mortgage upon her separate estate, and hence that the bank could not take it under the National Banking Act. U. S. Rev. Stat., §§ 5136, 5137. It has been decided that a National bank cannot take a mortgage upon real estate to secure a loan made on the faith thereof. But this indorsement is not a mortgage in any sense. It did not have the effect of conveying any property or of giving any specific or general lien upon any property. The indorser still had the right to deal with her property in all ways just as if she had not made the indorsement. The only practical effect of such an indorsement was to create against her a liability which could be enforced, as if she were not a married woman, out of any property which would be liable to execution whether she had it when she made the indorsement or subsequently acquired it. It is not necessary, in such a case, to resort to a court of equity to enforce the liability. It is not enforced by a proceeding against property upon the theory of a lien, but by a common-law action in which a personal judgment is rendered. *Corn Exchange Ins.*

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Co. v. Babcock, 42 N. Y. 613. Hence this indorsement be treated as personal security within the meaning of the Banking Act.

[Omitting an immaterial point.]

There was therefore no error, and the judgment was affirmed, with costs.

All concur, except ALLEN and MILLER, JJ., absent.

Judgment affirmed.

JOHNSON V. NATIONAL BANK OF GLOVERSVILLE.

(74 N. Y. 329: 30 Am. Rep. 302.)

Tury — discounting business paper.

A National bank, discounting business paper at a greater rate than seven per cent is liable to the forfeiture of double the excess over seven per cent imposed by the National Banking Act, although the transaction is not usual under the State law.

ACTION to recover the forfeiture provided by sections 514 and 5198 of the National Banking Act. The point is sufficiently indicated in the opinion. The plaintiff had judgment below.

H. S. Parkhurst, for appellant. The discount of business paper is not within the prohibition of the usury laws of this State *Cram v. Hendricks*, 8 Wend. 569; *Repelye v. Anderson*, 4 Hill 472; *Cobb v. Titus*, 10 N. Y. 198; *Nash v. White's Bank*, 68 id. 396. A National bank has the same right as natural persons to purchase business paper at any rate of discount that may be agreed upon. *Tiffany v. National Bk. of Missouri*, 18 Wall 409; s. c., *Thomp. N. B. Cas.* 90; *Hintermeister v. First N. Bank*, 64 N. Y. 216; *Thomp. N. B. Cas.* 741.

C. M. Park, for respondent.

RAPALLO, J. The same point which is raised in this case was made in *Nash v. White's Bank of Buffalo*, 68 N. Y. 396, viz.:

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his indorsement of the paper discounted being business paper and the transaction being usurious under the general statutes of the State the bank was not liable under the Banking Act for taking a greater rate of interest than seven per cent per annum thereon. We there held that the character of the paper was not material and that the act applied to all discounts as well as to loans.

In the case arose under the State Banking Act of 1870, chap. 10. The provisions affecting this case contained in the United States Banking Act, are identical with those of the State act, except that the latter specifies seven per cent per annum as the rate of interest which may be taken on every loan or discount made, upon any note, etc., while the act of Congress says that on any loan or discount interest may be taken at the rate allowed by the laws of the State where the bank is located, and that when the rate is fixed by the laws of the State, the bank may charge a rate not exceeding seven per centum.

We think that it was the intent of the act of Congress to limit the rate to be taken on the discount of commercial paper to seven per cent in those States where no rate was fixed by law for the interest of money, and where a rate was fixed, to limit the National banks to such rate. In this State the rate of interest on money is limited to seven per cent per annum, and the act of Congress consequently limits the rate of discount to that rate. It is claimed by the appellate that as the State law fixes no limit to the rate which natural persons may take for the discount or purchase of existing business paper, and the taking of discount at a greater rate than seven per cent on such paper is not usurious under the State law, there is no restriction upon the rate which National banks may take on similar discounts. We cannot so construe the act of Congress. It limits the rate of interest to be taken on loans and discounts. If the rate were limited only on loans there might be some plausibility in the argument that the purchase of business paper at a discount did not fall within the limitation. But it distinctly specifies discounts as well as loans, and it is well known that the principal office of banks of discount is to discount the business paper of their customers. The object of the statute was to limit the rate to be charged on these discounts as well as upon

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loans, and this rate is limited to the rate of interest fixed by the State law, for it says that the National bank may take on any discount interest at the rate allowed by the laws of the State. This, we think, refers to the rate fixed by the State law for interest for the use of money, and not the rate fixed by such law for the discount of commercial paper. If, however, it should be deemed to refer to the rate fixed for discounts, as well as for the use of money, then as there is no rate fixed in this State for such discounts, the provision of the act of Congress, that when no rate is fixed by the laws of the State the banks may take a rate not exceeding seven per cent, would apply. That the framers of the act understood that it applied to the discount of business as well as accommodation paper is apparent from the concluding provision of section 5197, viz.: that the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. If the rate to be charged on the discount, purchase or sale of a *bona fide* bill of exchange was not restricted at all by the previous provisions as to discounts, this provision was clearly superfluous. It evidently was understood that such paper was embraced in the restrictions, and the language "purchase, discount or sale of a *bona fide* bill" was employed so as to confine the privilege of including exchange in the sum charged for discount, to *bona fide* bills, drawn in the regular course of business, and to prevent its being made available to enable the banks, under the pretext of exchange, to charge additional discount on accommodation bills drawn merely for the purpose of raising money.

The effect of the act was, we consider, to restrict the rate of discount on all paper, whether accommodation or business paper, to the rate established by the State law for interest for the use of money, and when no such rate was established, to seven per cent per annum. The use of the word "usurious" at the end of section 5198 is not sufficient to govern the construction, and make it appear that the transaction must be usurious under the State law to authorize the recovery back of excessive interest paid. It

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is used for brevity, with reference to the preceding prohibitions and a violation of them may be usury under the act of Congress though not under the State law.

The judgment should be affirmed.

All concur, except MILLER and EARL, JJ., absent.

Judgment affirmed.

NATIONAL BANK OF AUBURN V. LEWIS.

N. Y. 516; 31 Am. Rep. 484.)

Usury — set-off — accommodation indorser.

Under the National Bank Act, in an action upon a note usuriously discounted by a National bank, the amount of the usury may be set off by an accommodation indorser, although the note does not carry interest on its face.*

ACTION on a promissory note. Defense of usury by an accommodation indorser. The defense was excluded. The opinion sufficiently discloses the points. The plaintiff had judgment below.

Rollin Tracy, for appellant.

E. H. Avery, for respondent. None of the facts alleged constituted or worked a forfeiture of any of the interest paid by the makers. 12 U. S. Stat. 99, § 30; *Hasbrouck v. Paddock*, 1 Barb. 635; *Hintermister v. First Nat. Bank*, 64 N. Y. 215. Usurious interest paid by the makers of a note cannot be recovered back by the indorser, or allowed by way of defense or set-off in an action against him. *Nash v. White's Bk. of Buffalo*, 67 N. Y. 396; 2 R. S., tit. 3, §§ 3, 4; 12 Stat. 99, § 30; *Marine Bank of Buffalo v. Fiske*, 9 Hun, 363; 2 R. S. 354, § 18, subd. 1, 2; *Kingston Bk. v. Gray*, 19 Barb. 459; *Lafarge v. Halsey*, 4 Abb. 397; *Rice v. Milks*, 7 Barb. 340; *Almy v. Harris*, 5 Johns. 175; *Stafford v. Ingersoll*, 3 Hill, 38.

MILLER, J. The first question for consideration upon this appeal

* See *Barnet v. Muncie Nat. Bk.*, ante, 18.

is whether the answers of the defendant state facts sufficient to establish the defense of usury if proven.

[Omitting this consideration.]

The facts stated in the answers referred to were amply sufficient, if proven, to make out a corrupt and usurious agreement; and the offer of proof presented the distinct question whether the interest paid was forfeited or could be allowed by way of set-off against or in rebatement of the plaintiff's demand.

As to the forfeiture of the interest under the act of Congress, we think it is quite clear that the facts stated by the pleadings establish a case within the meaning and intent of the act, and that the taking and receiving of illegal interest, under the circumstances, is available as a defense, by way of set-off or rebatement, in an action brought on the note claimed to have been usuriously discounted. The provision, section 5198, which declares a forfeiture, is penal in its character, and we concede should be strictly construed, and not held to include any alleged violation that is not clearly within the plain intention of the act. Nor should it be enlarged by implication, but confined within its legitimate scope and object. Having due regard to this rule, we think, a forfeiture of the interest means that it shall be lost to the lender, and that it shall be refunded, if required, when "taken in advance," as is authorized by section 5197, or otherwise received; and such forfeiture may be enforced when a suit is brought upon the note or obligation, and the recovery restricted to the actual sum loaned. Such a construction is placed upon the sections cited in some of the reported cases. In *Hintermeister v. First National Bank of Chittenango*, 64 N. Y. 212, 215, Thomp. N. B. Cas. 741, ALLEN, J., in construing the provisions cited, says: "That this forfeiture attaches and is enforced only in actions brought upon or to enforce the usurious contract. It limits the right of recovery in such actions to the money actually loaned without interest." In the State of Pennsylvania, it is held, in several cases, that when an action is brought by a National bank, upon notes discounted at a usurious rate of interest, when the defense of usury is interposed, the bank can only recover the sum actually loaned or advanced, and the entire interest is forfeited, and may be set off against the demand. *Brown*

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v. *Second National Bank of Erie*, 72 Penn. St. 209, 213; s. c., Thomp. N. B. Cas. 849; *Overholt v. National Bank of Mt. Pleasant*, 82 Penn. St. 490; s. c., Thomp. N. B. Cas. 833; *Lucas v. Gov. National Bank of Pottsville*, 78 Penn. St. 228; s. c., 21 Am. Rep. 17; Thomp. N. B. Cas. 872; see, also, *National Bank of Madison v. Davis*, Thomp. N. B. Cas. 350.

It is said that under section 5198, interest can only be forfeited when the note carries interest with it, and the excessive rate of interest has been agreed to be paid. Such a construction would restrict a recovery to cases where the note bears interest upon its face only, and I think, is not sanctioned by a fair interpretation of the law. If the interest has been paid in advance, as is authorized by law, then within the meaning of the statute, that interest is carried with the note, and has been agreed to be paid upon the same. It is enough that it has been taken, received or charged to create a forfeiture, as is held in the opinion, which analyzes the different sections of the act, in *F. and M. Nat. Bank v. Dearing*, 1 Otto, 29, s. c., Thomp. N. B. Cas. 117, and as is also fully sustained in the cases to which we have referred. The effect of the construction contended for would be to render the law inoperative and of but little avail, as interest, in transactions of this kind, is usually paid in advance, as authorized, and cannot be upheld upon any sound rule applicable to the interpretation of statutes of this description.

The right of an accommodation indorser, without consideration, to the same benefit as the makers would have under the National Banking Act, by way of set-off or rebatement of the interest usuriously taken on notes discounted, is, I think, well settled. The first indorser is not a party in the action. It does not appear that the makers have been served with process; and the recovery here is sought against the second indorser alone. He is called upon to pay the entire demand; and upon principle, there appears to be no reason why he is not entitled to the same defenses as the maker may have. Section 5198 declares that there shall be a forfeiture, without confining it to the maker; and it is a reasonable presumption that it should be for the benefit of any one who might be compelled to pay the obligation. We think it certainly applies

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to a party who has been sued upon the note and against whom alone a remedy is sought, by an action to recover the amount of the same. That the indorser is entitled to the benefit of this provision is also decided in several cases. *In re Wild*, 11 Blatchf. 243; Thomp. N. B. Cas. 246, Wild was the indorser, without consideration, and a mere surety of the notes in question, which were given in renewal of prior notes held by a National bank, and it was laid down by WOODRUFF, Circuit judge, that the loan being made, reserving a compensation exceeding seven per cent interest per annum, "the transaction in question was within the prohibition of the National Banking Law, and that the bank, *eo instanti* it made the loan, upon the terms exacted, incurred the forfeiture of the entire interest which the notes received, carried with them, or which was agreed to be paid thereon." See, also, *Nat. Ex. Bank of Columbus v. Munroe*, 2 Bond. 170; *Brown v. Second National Bank of Erie*, 72 Penn. 209; s. c., Thomp. N. B. Cas. 849; *Cake v. First National Bank of Lebanon*, 86 Penn. St. 303; s. c., Thomp. N. B. Cas. 890.

The moment usurious interest is taken or charged, the forfeiture is established; and as the cases hold, any party to the transaction may avail himself of it, if payment is sought to be enforced against him. Under the usury laws of this State the term "borrower" includes any person who is a party to the original contract, or in any way liable to pay the loan. *Wheelock v. Lee*, 64 N. Y. 247; *Bissell v. Kellogg*, 65 id. 432; *Livingston v. Harris*, 11 Wend. 329; *Post v. Bank of Utica*, 7 Hill, 391. Applying the same principle, the person by whom the usury is paid, or his legal representative, may well be regarded as including the indorser. The right to set off the usury taken, or to rebate the note to that extent, in this case, does not rest upon the same principle as the statutes in regard to that subject, in this State, but upon the construction of the act of Congress, which, as we have seen, is held in the reported cases cited, to authorize such a defense by the indorser, when sued upon the note. It is enough that when called upon to pay, such right exists, without considering the question, which is not now before us, whether the indorser can maintain

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an action to recover back the interest paid by the maker, before he has paid the demand.

In the case at bar, the entire line or series of notes discounted, which are stated at length in the sixth defense, constitutes one connected and continuous transaction; and under such circumstances, the taint of usury affects the whole, and when the bank sues to recover upon the last of a series of renewal notes, the forfeiture of the entire interest follows as a necessary result, and credit must be given for all the interest which has been paid from the beginning on the loan. *Overholt v. National Bank of Mt. Pleasant, supra*; *Tuthill v. Daves*, 20 Johns. 286; *Cake v. First National Bank of Lebanon, supra*; *Brown v. Second National Bank of Erie, supra*.

The defendant was clearly entitled, upon the trial, to introduce evidence showing the taking of usury upon the various notes described in the answers; and the court erred in rejecting the various offers made, relating to the same.

For the errors referred to the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

ROBINSON V. NATIONAL BANK OF NEW BERNE.

(58 How. Pr. 306.)

Jurisdiction of State courts — attachments against National banks.

A State court has jurisdiction of an action on contract brought by a resident of the State against a National bank located in another State, and except as against a National bank which has committed or is contemplating an act of insolvency.

An attachment can issue against a National bank from a State court. (*See note, p. 316.*)

(New York Court of Appeals.)

THE opinion states the case.

A. R. Dyett, for appellant.

T. C. Cronin, for respondent.

DANFORTH, J. This case comes here upon appeal by defendant from an order made by a General Term of the Supreme Court of the fourth department upon the following facts: The plaintiff resides in this State and is a creditor of the defendant. The defendant is a banking association organized under the laws of the United States (*title LXII, U. S. R. S.*) and is located at New Berne, North Carolina. Upon affidavits showing these and other facts sufficient to bring the case within the provisions of the Code of Civil Procedure, in force in this State, an attachment was granted by one of the justices of the Supreme Court and levied upon property of the defendant in the city of New York. The defendant moved at a Special Term to vacate the attachment, but the motion was denied and the order there made was affirmed at General Term. It is from the order of affirmance that this appeal is taken. The defendant seeks to sustain the appeal upon two grounds: First. That the Supreme Court had no jurisdiction over the action. Second. If otherwise, it had no power to grant the attachment. But notwithstanding the ingenious argument of the learned counsel for the appellant, I think neither position can be sustained. First, as to jurisdiction; it is not necessary to consider whether Congress might have conferred upon the Federal courts exclusive judgment over actions against National banks and prohibited the State courts from entertaining them; but this could be done, if at all, only by express language or provisions consistent only with that construction. *Houston v. Moore*, 5 Wheat. 1, and other cases cited *infra*. In its absence a State court would have the same power and jurisdiction in suits, to which a National bank was a party, as if it was an individual. *Bower v. First Nat. Bank of Medina*, 34 How. Pr. 409; *Cooke v. State Nat. Bank of Boston*, 52 N. Y. 96; s. o., 11 Am. Rep. 667; *Thomp. N. B. Cas.* 698. I do not find such language or provisions in the act under which the defendant is organized. Nor is its existence

claimed by the learned counsel for the appellant who has submitted this case in an exhaustive oral and printed argument. In the latter he says: "And Congress has not only nowhere deprived the State courts of jurisdiction of *actions against National banks* but has expressly conferred it, at the same time conferring a similar jurisdiction upon the Federal courts, but in both cases requiring actions and proceedings against them to be brought *in the State where they are located* and protecting them from attachment and similar process *before judgment*," and asserts "that the plaintiff has all the remedy to which he has any just claim in an action against the defendant in the State or Federal courts of North Carolina."

The contention then is, that outside of the State where the bank is located, neither Federal nor State courts have jurisdiction, and that redress for any cause of action must be there sought, and as it has been held that the statute referred to extends to actions *by* as well as against these corporations (*Kennedy v. Gibson*, 8 Wall. 493; Thomp. N. B. Cas. 17) it would follow that the bank must confine its operations to the limit of its own State or be deprived of legal or judicial aid to enforce its rights. This construction seems to be unwarranted by the very conditions of its being. The defendant was endowed with certain powers and privileges, in the exercise of which it might be brought into relation with citizens of different States, and we might therefore expect that its liabilities arising therefrom could be enforced in the same manner and to the same extent as if it was a natural person and not a creation of the law. It was to loan money and discount commercial paper, and although located in North Carolina its transactions might extend into other States, for its interest would follow the person of its debtors, and it would be concerned in the disposition of his property wherever situated. ("It is, therefore, provided that it may purchase and hold such real estate as may be mortgaged to it in good faith by way of security for debts previously contracted, or such as shall be conveyed to it in satisfaction of similar debts contracted in the course of its dealings, or such as it shall purchase at sales under judgment, decrees or mortgages held by it, or shall purchase to secure debts due it" § 5137, sub. 23, U.

S. Rev. Stats.) It is obvious, then, that it might have occasion to sue its debtor in any State and resort to the courts therein for protection in the enjoyment of the property which it is thus permitted to acquire; as the owner of property it might also incur liability to citizens of the State or municipality where it was situated; and we also find that it may incur a statutory liability to its borrower, and that if it violates the law relating to interest, he may recover back twice the amount of excessive interest paid by him. Against it, therefore, the individual might find it necessary to put in motion the machinery of the courts, and from these powers and liabilities a right on either side to do so might be implied. But this is not left to implication. The statute declares that the defendant may "sue and be sued" in any court of law and equity as fully as a natural person. § 5136, sub. 4. Now such a person, a citizen of North Carolina, might sue in any State where he could find his debtor, or the property of his debtor, and he was liable to be sued in any State where he might happen to be or where his property could be found, and the proceeding would, in the courts of the State, be according to the jurisdiction given to them by the State; and suits might also be brought in the courts of the United States, provided the contending parties were not citizens of the same State. If they were, it could not have been until the passage of the National Banking Act of 1864 (§ 57, amended March 3, 1873, vol. 17, U. S. Stats. at Large, chap. 269, § 2; § 5198, U. S. Rev. Statutes), where it was, among other things, enacted "that suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established." The evident object of this provision was to give the Federal courts jurisdiction without regard to the citizenship of the plaintiff. 11 Blatch. 102. But the same section further provides "that such suit, etc., may also be had in any State, county or municipal court in the county or city in which such association is located, having jurisdiction in similar cases." And, as above stated, this section has been construed so as to permit suits by as well as against the corporation. *Kennedy v. Gibson*, 8 Wall.

498; Thomp. N. B. Cas. 17. It is this clause upon which the appellant relies in support of the proposition we are now considering. It has however been already declared in this court that these words cannot be construed as taking away the jurisdiction of the courts of this State over associations similar to this defendant. *Cooke v. State Nat. Bank of Boston*, 52 N. Y. 96; s. c., 11 Am. Rep. 667; Thomp. N. B. Cas. 698, and the argument on which that case rests need not be repeated. It finds confirmation, however, in the consequences likely to result from a different doctrine. Nor can we suppose that the general power and liability to sue and be sued, given by statute as above stated, was intended to be repealed or modified in this indirect manner. The general liability subjects them to an action in any court in which an individual in like circumstances might be sued, and the subsequent enumeration of particular courts, without words of exclusion, cannot have the effect to deprive other courts of jurisdiction. *Owens v. Woosman*, L. R., 3 Q. B. 469. If it was otherwise, then a citizen of this State having claim upon land in which a banking association located in another State had an adverse interest, would be compelled to go there to assume his rights against it. Yet the contrary has been held by the Supreme Court of the United States in a recent case decided October term, 1879. *Casey, Recr., v. Adams* (*ante*, p. 102). Referring to section 5198, above cited, the court holds that it applies to transitory actions only, and not to such as are by law local in their character, WAITE, Ch. J., saying: "Section 5136 subjects the banker to suits at law or in equity as fully as natural persons, and there is nowhere in the Banking Act any evidence of an intention on the part of Congress to exempt bankers from the ordinary rules of law affecting the locality of actions founded on local things. The distinction between local and transitory actions is as old as actions themselves, and no one has ever supposed that laws which prescribed generally where one should be sued, included such suits as were local in their character, either by statute or the common law, unless it was expressly so declared. Local actions are in the nature of suits *in rem*, and are to be prosecuted where the thing on which they are prosecuted is situated. To give the

act of Congress a different construction would be, in effect, to declare that a National bank could not be sued at all in a local action, where the thing about which the suit was brought was not in the judicial district of the United States within which the bank was located. Such result could never have been contemplated by Congress." We may construe the words of section 5198, which confer power to bring suits in certain specified courts as permissive merely and not mandatory, and, therefore, not limiting the general rule which permits civil cases arising under the laws of the United States to be prosecuted and determined in the State courts, unless exclusive jurisdiction of them has been vested in the Federal courts, or unless Congress has prohibited the State courts from entertaining jurisdiction of such cases. *Claffin v. Houseman*, 93 U. S. 130; 1 Kent Com., pp. 395, 396; *Bank of U. S. v. Devereux*, 5 Cr. 85; *Osborne v. U. S. Bank*, 9 Wheat. 733; *Teale v. Fulton*, 1 Com. 537. In *Houston v. Moore*, 5 Wheat. 1, Mr. Justice WASHINGTON, in delivering judgment, says, p. 27: "I hold it to be perfectly clear that Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States although the State courts may exercise jurisdiction in cases authorized by the laws of the State and not prohibited by the exclusive jurisdiction of the Federal courts;" and that case also holds that the mere assignment of jurisdiction to a particular court does not necessarily render it exclusive. It may very well be that when the right in controversy is created by an act of Congress, and the remedy is prescribed to be by suit in the Federal courts, the State courts have no jurisdiction. But that is not this case, nor are these words of exclusion. If we look into other laws enacted by Congress, and in which provision is made for proceedings before one court rather than another, we shall find a marked difference in language implying clearly a different interest. In title 13, chapter 12, United States Revised Statutes, concerning the judiciary, eight cases of suits and proceedings and litigants of particular character are specified, and as to them it is said: "The jurisdiction vested in the courts of the United States * * * shall be exclusive of the courts of the several States." We cannot doubt that language equally

explicit would have been used had a similar purpose been entertained in regard to matters of controversy under the Banking Law. It was not, and for this and other reasons above stated I am of the opinion that the Supreme Court had jurisdiction of the matter involved in this action.

Second. Is the attachment prohibited? To determine this we must look at the whole section relating to it. It is section 5242 of the United States Revised Statutes (edition of 1878), and is in these words: "Section 5242. All transfers of the notes, bonds, bills of exchange or evidences of debt owing to any banking association or of deposits to its credit; all assignments of mortgages, sureties on real estate or of judgment or decrees in its favor; all deposits of money, bullion or other valuable things for its use, or for the use of any of its shareholders or creditors, and all payments of money to either made after the commission of an act of insolvency, or in contemplation thereof made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with the view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any State, county or municipal court." It is found in title 62, chapter 4, entitled "Dissolution and Receivership;" and although in ordinary cases it is said that the title of an act of Congress is entitled to little, if any, weight (*Hadden v. The Collector*, 5 Wall. 107), yet when it occurs in the revision of the statutes it cannot be entirely disregarded. It would seem, in such a case, to indicate with great certainty what was in the mind of the legislature. The subject-matter of the section is the transfer of property by a banking association made "after the commission of an act of insolvency, or in contemplation thereof," when made under the circumstances therein stated, such transfer, it says, "shall be utterly null and void, and no attachment * *

* shall be issued against such association or its property before final judgment in any suit, action or proceeding in any State, county or municipal court." We concur with the General Term

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in the opinion that these words of prohibition must be deemed to have the same relation as the other things prohibited and apply only to insolvent corporations, or one about to become so; and that the object of the entire section is to prevent one creditor of a corporation, whose assets are insufficient to meet its liability, from obtaining a preference, whether it is sought through a voluntary assignment or transfer, or payment, or the form of a legal proceeding. It is plain that this is not the case before us; nor is the cause of action created by the act; nor does it arise in consequence of the violation of any of its provisions. It is for breach of contract, a remedy for which by action exists at common law, and for the enforcement of which against the property of a non-resident the statute has given the suit in question. It is a proceeding *in rem*, merely, not *in personam*, for that purpose the court neither has nor does it assume to have jurisdiction. *People v. Baker*, 76 N. Y. 87; s. c., 32 Am. Rep. 274. It must therefore, like other proceedings *in rem*, be prosecuted where the thing on which it is founded is situated. *Casey v. Adams, supra*. The attachment is not to bring the defendant into court, its object is to give the plaintiff execution against the thing attached. *Kilbourn v. Woodworth*, 5 Johns. 37. It does not go beyond it. It is not to compel the payment of debts but to make the property of absentees liable for their debts. Execution can go no further, neither against the property nor the person. It is confined to the property taken, and if it cannot be maintained the plaintiff is remediless unless he goes out of his own State and into the place where the debtor is located; for as we have seen, according to the appellant's theory, the State court has jurisdiction only in that place; and the same statute which confers it in like manner restricts the jurisdiction of the Federal courts.

The order appealed from should be affirmed with costs.

All concur.

NOTE BY THE REPORTER.— See *Rhorer v. First National Bank of Allentown*, post; *Southwick v. First National Bank*, Thomp. N. B. Cas. 789; *Central National Bank v. Richland National B'k*, id. 801.

The following are the material parts of the opinion in *Bowen v. First National Bank of Medina*, cited in the principal case, and of which only a memorandum was given in *Thompson's National Bank Cases*:

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This brings up the important point in the case, whether the law will permit the property of these banking associations to be seized by attachment, upon the ground that they are foreign corporations. They are clearly not foreign corporations, within the common import of those terms; for they are formed under the laws of the Federal government, which are not foreign to the State of New York. Those laws constitute a part of the government of the people of the State, so far as they are constitutionally enacted, as completely as the laws do which are constitutionally enacted by its own legislature; and, within their appropriate sphere, they are paramount to the laws enacted by the authority of the State itself. They are in no sense foreign laws. Neither are the institutions or corporations for which they provide foreign in their character; for they are provided for by an integral portion of the government of the people existing within the State, though forming no part of its State government. It is done by the National authority, existing and exercising its functions within the States; and no question is presented upon the present appeal in any manner drawing the propriety of this legislation in controversy. What is now involved is the construction which shall be placed upon the law providing for the issuing of attachments against foreign corporations, not as those terms are popularly understood, but as they have been used by the legislature. Ordinarily, it is to be presumed that the popular sense of the terms used is the sense in which they were used by the authority enacting the laws; but in this instance there is good reason for believing that such was not the case; for, in describing the bodies that are referred to as foreign corporations, the description has not been confined to those which may be found under the laws of some other State or country foreign to this State, but it has been extended beyond that, so as to include

within the comprehension of the law all such corporations as may be formed under any other government than that of the State itself, properly so called. This is not a new feature in the legislation of the State; it will be found embodied in the laws contained in the Revised Statutes, which provided for attachments against what were designated as "foreign corporations." Under the statute then enacted, attachments could, by the express language used, be issued against a "corporation created under the laws of any other State, government or country," where the action was for the recovery of any debt or damages arising on a contract made within this State, or a cause of action arising therein. (2 R. S., Edm. ed., 479, § 15.) The corporations thus described are referred to in several of the succeeding sections as "such corporation," while in others they are called "foreign corporations;" indicating the legislative sense to be that "foreign corporations," and "corporations formed under the laws of any other State, government or country," included precisely the same subjects of legislation. This appears to have been done, not for the purpose of restricting the process of attachment to such corporations as were strictly foreign in their nature, on account of their having been formed under the laws of another State or country, but for the purpose of designating those corporations which it had previously been provided could be proceeded against in that manner as foreign corporations. It was in substance a legislative declaration that the terms "foreign corporation" were to be understood in the law as including such corporations as were formed under the laws of any other government than that of the State which enacted the law, as well as those formed under the laws of any other State or country. If that was not the sense in which these terms were used, then none whatever can be discovered in the law which can be at-

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tributed to them, for no intention is indicated of restricting the legal signification of the section first referred to, in any manner whatsoever. It is not to be supposed that the terms, "any other government," in this connection, were made use of without any definite purpose; and they must have been, if the object of the law was to include only such corporations as should be formed under the laws of another State or country. But one object could have been intended by their use, and that was to include all such corporations as were not formed under the laws enacted by the State itself, even though they were not formed under the laws of another State or country. If they are to have any meaning whatever, that must be their import; for in no other way can any effect be given to them. And if that was the intention the legislature designed to express by them in the enactment of the Revised Statutes, they must have the same construction in the Code; for the provisions of the Code, in this respect, are substantially taken from the pre-existing legislation relating to the same subject. (2 R. S., Edm. ed., 479, §§ 15, 30; Statutes at Large, vol. 4, 677.)

By chapter 1, title 13, of the Code, it is provided that actions may be brought in the Supreme Court, etc., against corporations created by or under the laws of any other State, government or country, by residents of the State, for any cause of action, and by non-residents, when the cause of action shall have arisen, or the subject of the action shall be situated, within the State. And by chapter 4 of title 7, an attachment may be issued when the action is for the recovery of money, and it is brought against a corporation created by or under the laws of any other State, government or country. These terms, it will be seen, are used designedly in all the laws relating to this subject, and, as before observed, they must have been intended to include all corporations formed under the laws of

any other government than the one enacting the law, even though that government should not be the government of another State or country, which would plainly include the government of the United States. And when the terms "foreign corporation" are afterward used, as they are in sections 229 to 239, they were intended to include and refer to the corporations comprehended within the general language of section 227, and to be equally extended in their legal import; and, as so understood, they include corporations formed under the laws of the United States, for that is a government other and different than the one speaking through the law under consideration.

As thus construed and understood, the National banks formed under the act of Congress are foreign corporations, and liable to attachment, within the provisions of the Code; for, though formed under a law enacted by the government constituting a portion of the government of the people of the State, it is still no part of the State government properly so called, and is entirely distinct and separate from that which enacts the State laws.

If these institutions are not liable to proceedings by attachment, under the provisions of the Code, then in many cases persons living within this State would be provided by its laws with no remedy against them; for, as they are not formed under the laws of any other State or country, suits could not be maintained against them, even where they should be organized and transact their ordinary business in another State, and their property should be found within this State, unless that could be done upon the ground that they were formed under the laws of another government. They are not, where they exist in other States, formed under the laws of such States. Neither are they formed under the laws of any other country, as that term is used in the statute, for that was in-

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tended to refer to corporations formed under the laws of foreign countries. The only manner in which they can be sued at all in this State, where they are formed and exist in other States, is under this provision of the law which allows proceedings by attachment to be taken against them as corporations formed under another government different and distinguishable from that of this State. And if this provision will, as it clearly must, include all such corporations as may be formed in other States, under the laws of the United States, it certainly will those formed in this State, for they are, equally with the others, formed under the laws of another government, as those terms are made use of in the Code of Procedure.

They are rendered liable to actions in the courts of the State by the act of Congress under which they are organized; and no restriction whatever is imposed, requiring such actions to be brought in any particular way, or limiting them to the same proceedings as may, under the laws of the State, be taken against the corporations formed under those laws (13 U. S. Stat. at Large, 116, § 57), but they are made liable generally to suits, actions and proceedings provided by the State, and

they must necessarily be commenced and prosecuted as its laws have designated they may be. In that respect, they are liable to all such proceedings as the laws have provided for rendering the suits that may be commenced against them legally effectual; and as the laws of this State are now formed, that can only be done by holding the National banking institutions liable to proceedings by way of attachment, as corporations formed under the laws of a government distinct and different from that of the State. No difficulty stands in the way of doing this, under the 52d section of the National Banking Law; for that does not prohibit the seizure of the property and effects of an insolvent banking corporation, by its creditors, when it can lawfully be done by way of attachment proceedings. It merely prohibits the corporation itself from assigning or transferring its property, or paying its debts, after the commission of an act of insolvency, or in contemplation of insolvency, when that shall be done with the intent or design mentioned in the section; and the succeeding section extends the prohibition to the directors, officers, agents and servants of the corporation. 13 U. S. Stat. at Large, §§ 52, 53, 115, 116.

PATTISON V. SYRACUSE NATIONAL BANK.**Responsibility for special deposits.*

A National bank is liable for a special deposit, received by its teller on behalf of the bank, in accordance with its usage, for gratuitous safe-keeping, and lost through its gross negligence.

(New York Court of Appeals.)

THE opinion states the case.

RAPALLO, J. The leading point made by the appellant is that

* Not yet reported. See *First National Bank of Carlisle v. Graham*, ante, p. 64.

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a bank organized under the National Banking Act (Laws of U. S., 1864, ch. 106) has no authority to receive special deposits of securities, etc., for safe-keeping, and that consequently the defendant incurred no liability by the receipt by its teller of the package deposited by the plaintiffs, and cannot be held responsible for its loss, even though the teller in receiving the deposit assumed to act in behalf of the bank, in accordance with its practice, and did so with the knowledge of its managers, and the loss occurred through gross negligence on the part of the officers of the bank. The respondent disputes both the premises and the conclusion.

In most of the cases in which the question of the liability of banks for special deposits has been considered, and which will be more particularly referred to hereafter, the corporate power of a bank to bind itself by such a transaction has been conceded, and the cases have turned upon questions relating to the authority of the officers receiving the deposits, and the degree of negligence by which the loss was occasioned. If it be assumed that the receiving of such deposits is a legitimate part of the business of banking, and that banks not organized under the act of Congress, which see fit to receive such deposits, may do so, there is nothing in the act of 1864 which especially restricts National banks in this respect. The act provides (section 5) that associations for carrying on the business of banking may be formed in a certain manner. Section 8 declares, that upon complying with the provisions of the act, such associations shall be corporations and may adopt a corporate name and may in that name make contracts; and further, that they may exercise under the act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits, by buying and selling exchange, coin and bullion; by loaning money on personal security, by obtaining, issuing and circulating notes according to the provisions of the act. It cannot be contended that because the power to receive special deposits is not particularly mentioned, therefore it is intended to place banks organized under this act on a different footing in this respect from other banks. There are many contracts incident to the banking business, which

although not enumerated in the act, are daily made by National banks without question as to their authority, such as receiving notes, checks, etc., for collection, etc. They are authorized to make any contracts, which legitimately appertain to the business of banking, and if receiving special as well as general deposits falls within the scope of that business, the power to receive deposits includes all kinds of deposits which are known and customary in the banking business.

That the enumeration of banking powers contained in the act of 1864 was not significant of an intention to place any special restriction upon National banks as distinguished from State banks is apparent from the fact that it is a usual formula descriptive of the banking business contained in bank charters (charter of Commercial Bank of Albany, Laws of 1825, p. 198; Dutchess Co. Bank, *id.* p. 204), and is almost identical with that contained in the General Banking Law of 1838 (Laws of 1838, p. 249, sec. 18), which provides that "each association shall have power to carry on the business of banking by discounting bills, notes and other evidences of debt; by receiving deposits; by buying and selling gold and silver bullion, foreign coin and bills of exchange in the manner specified in this act, by loaning money on real and personal security, and by exercising such incidental powers as shall be necessary to carry on such business."

The meaning of the two provisions is the same, and their language is the same except in the order of arrangement. In both the business of banking is defined, that is, discounting paper, receiving deposits, etc., and all powers incident to these general powers are added. In the act of Congress the frame of the sentence is that National banks shall exercise all such incidental powers as shall be necessary to carry on the business of banking, and then follows a description of the banking business, while in the act of 1838 the banking business is first described, and the grant of incidental powers follows. The enumeration in the act of Congress is not of the incidental but of the principal powers, and to these are superadded all incidental powers. The question remains the same, therefore, as to a National as to a State bank, whether the power of receiving special deposits is incidental to

the banking business, and no distinction can be made in determining this question between a State and a National bank.

In the leading case upon the subject, *Foster v. Essex Bank*, 17 Mass. 479, A. D. 1821, where a special deposit had been made, with the defendant, of a cask containing gold coin, it was shown that it had been the practice of the bank to receive special deposits of money and other valuable things, but there was no regulation, or by-law, or provision of the charter upon the subject. The counsel for the plaintiff, as in the present case, claimed that it had been the practice of banks from the earliest periods to receive such deposits. That the Bank of England had no express power to do so, but it had become a part of their duty or business by usage, and belonged to the very nature of such institutions. On the other side it was denied that the bank had any such power, or that it was incidental to the business of a bank or banker; that the authority could not be inferred from usage, and the repetition of unauthorized acts by the officers could not give them validity, and the officers only, not the bank, were bound. The point was thus distinctly presented. It was argued by the most eminent counsel of the period, and decided by a court of distinguished reputation. The court held that the practice of the bank having been to receive such deposits, and its building and vaults having been allowed to be used for that purpose, and its officers employed in receiving into custody the things deposited, the corporation, and not the cashier or other officer through whose particular agency the property may have been received into the bank, must be deemed the depository.

The next case on the point is *Lloyd v. West Branch Bank*, 15 Penn. St. 172, decided in 1850. It was there held that the power to receive deposits conferred on the bank by the Pennsylvania Banking Law referred to deposits of current money received as such and not to special deposits. But the court although indulging in some strong expressions indicative of an opinion that the statute did not intend to confer the power, states the question to be whether there was any such general custom or practice of the cashier of the bank to act as a voluntary bailee without reward, as to make the bank liable for his acts, and the decision rests upon

the want of evidence of any such practice. The court was undoubtedly correct in holding that it was not intended that banks should be turned into pawn-brokers' shops, or receive old clothes on deposit. But the case is not an authority for the proposition, that if a bank is in the habit of receiving on deposit coin or other valuables such as are usually the subject of special deposits in banks, it will not be bound by the act of its officers in receiving them.

But in later cases in the same State the doctrine of *Foster v. Essex Bank* is expressly recognized and applied to National banks. In *Lancaster Co. Nat. Bank v. Smith*, 62 Penn. St. 47, where a special deposit of the U. S. bonds had been made with the bank by delivering them to the teller, and the teller had subsequently delivered them to a third party supposed to be the depositor, but without ascertaining his identity, the bank was held liable. The case of *Lloyd v. West Branch Bank* was referred to, but the power of the bank to bind itself by receiving the deposit was not disputed, and it was held that it was a question for the jury whether the bank had been guilty of gross negligence.

In *Scott v. National Bank of Chester Valley*, 72 Penn. St. 471; s. c., 13 Am. Rep. 711; Thomp. N. B. Cas. 864, the facts were almost identical with those in *Foster v. Essex Bank*. A special deposit of bonds for safe-keeping had been made with the defendant by one of its customers, and the bonds were stolen by the teller of the bank, but no negligence on the part of the bank was established, and a verdict for the defendant on that ground was sustained. The receipt of the bonds was not claimed to be *ultra vires*.

In *First National Bank of Carlisle v. Graham*, 79 Penn. St. 106; s. c., 21 Am. Rep. 49; Thomp. N. B. Cas. 875, the plaintiff sued for the loss of U. S. bonds claimed to have been deposited by her with the bank, and relied upon a receipt for the bonds signed by the cashier of the bank, in which he acknowledged that she had left the bonds in the bank for safe-keeping. It was admitted that government bonds were received by the bank for safe-keeping with the knowledge of the president, cashier and teller, and without compensation. A verdict and judg-

ment having been rendered for the plaintiff, it was reversed on exceptions to rulings on questions of evidence or to some portions of the charge in submitting to the jury the question of negligence, but on the point of the liability of the bank the doctrine of *Foster v. Essex Bank* was emphatically reiterated, and it is stated that the rule as laid down in that case has been uniformly applied in the Supreme Court of Pennsylvania in cases involving the rights and duties of National banks.

In *Turner v. First National Bank of Keokuk*, 26 Iowa, 562; Thomp. N. B. Cas. 454, the liability of a National bank for a special deposit of bonds was also recognized. *Smith v. First National Bank of Westfield*, 99 Mass. 605, was also a case of a special deposit of bonds with a National bank, and the bank was held to be bailee of the bonds liable only for want of ordinary care.

To the same effect is *Giblin v. McMullen*, L. R., 2 P. C. 317.

In *Chattahoochie National Bank v. Schley*, 38 Ga. 369; Thomp. N. B. Cas. 379, the court after referring to some of the cases which have been cited, and also to the recent cases of *First National Bank v. Ocean National Bank*, 60 N. Y. 278; s. c., 19 Am. Rep. 181; Thomp. N. B. Cas. 728; *Wiley v. First National Bank of Brattleboro*, 47 Vt. 546; s. c., 19 Am. Rep. 122; Thomp. N. B. Cas. 905, summarises its view of the existing law as follows: "By habitually receiving through its cashier special deposits to be kept gratuitously for mere accommodation, a National bank will incur liability for gross negligence in respect to any such deposits received in the usual way." This I adopt as a concise and accurate statement of the result of the decisions to which I have referred.

The only adjudications to be found in conflict with this doctrine are the cases of *Wiley v. First National Bank*, 47 Vt. 546; s. c., 19 Am. Rep. 122; Thomp. N. B. Cas. 905, followed by the same court in 50 Vt. 389 (see *ante*, 69, *note*), where it was held, in direct opposition to all the cases I have cited, that when a special deposit is received by a National bank, even in accordance with usage, and with the knowledge and acquiescence of the directors of the bank, the bank is not liable for its loss even by

gross negligence; and this is put upon the ground that the bank has no corporate capacity to receive such deposits for safe-keeping, and consequently cannot empower any of its officers to incur liability in its behalf by so doing.

There are some cases in which the Vermont cases are referred to with approval by the judge writing the opinion (*Third National Bank of Baltimore v. Boyd*, 44 Md. 47; s. c., 22 Am. Rep. 35; Thomp. N. B. Cas. 45; *First National Bank v. Ocean National Bank*, 60 N. Y. 278; s. c., 19 Am. Rep. 181; Thomp. N. B. Cas. 728), but there is no other adjudication to the same effect. In the case in 60 N. Y. the opinion expressly states that it is unnecessary to consider the question of the power of the bank; that it is a question not free from difficulty, but can be more satisfactorily considered when it becomes necessary to a judgment. The opinion proceeds upon the ground that the receiving of special deposits was not shown to be part of the ordinary business of the bank; that there was an entire absence of evidence that it was the habit or practice of the defendant to receive such deposits; that no authority to the cashier or assistant cashier to receive special deposits had been shown, and whatever might be the incidental powers of the corporation, the power of its officers to bind it can be presumed only to exist within the scope of its ordinary business and their ordinary duties.

It is upon this distinction between the facts in the case before the court, and those in *Foster v. Essex Bank*, that the opinion proceeds and not upon a rejection of the doctrine of that case. The opinion even in so far as it rests upon that distinction was not concurred in by the majority of the court, there being an exception upon another point which was sufficient ground for reversal of the judgment, and the majority concurred only in the result. What is said by the learned judges in respect to the Vermont case is merely incidental, and forms no part of the reasoning of the opinion and was not considered or passed upon by the court.

Appended to a report of the case in 47 Vermont, contained in 14 Am. Law Register (N. S.), 348, is a note by an eminent jurist, approving the decision and criticising the proposition that any

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practice or usage of a bank in receiving special deposits can supply the want of corporate power and respecting the same arguments which were urged by counsel in the case of *Foster v. Essex Bank*, 17 Mass. This want of corporate power is alleged on the ground that the power to receive deposits does not embrace receiving special deposits of valuables for safe-keeping and that the receipt of deposits of that character is wholly outside of and foreign to the business of banking and cannot be regarded as incidental to that business.

For the purpose of determining whether such is the case the counsel for the respondent have referred to the history of banking from its earliest period, and to the definitions by lexicographers of the banking business. This would seem to be a proper way of ascertaining what is legitimately within the scope of the business of banking and what are the powers of corporations formed for the purpose of carrying on that business. When the attributes of a particular calling come in question they can only be ascertained by showing what has been the general usage and practice of persons engaged in that calling, and what business has been generally transacted by them and understood to appertain to such calling. Thus only can it be ascertained what transactions are within or without the scope of such calling. A reference to the history of banking discloses that the chief, and in some cases the only, deposits received by the early banks were special deposits of money, bullion, plate, etc., for safe-keeping, to be specifically returned to the depositor. That such was the character of the business done by the Bank of Venice (the earliest bank) and the old Bank of Amsterdam, and that the same business was done by the goldsmiths of London and the Bank of England, and we know of none of the earlier banks where it was not done. The definition of the business of banks of deposit in the Encyclopedias embraces the receiving of the money or valuables of others to keep until called for by the depositors; *Encyclopedia Americana*, fol. 1; id. 543; *English Encyclopedia of Arts and Science*, fol. 1, 833, 837, 841, and although in modern times the business of receiving general deposits has constituted the principal business of the banks, it cannot be

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said that the receiving of special deposits is so foreign to the banking business that corporations authorized to carry on that business are incapable of binding themselves by the receipt of such deposits. The numerous cases in the books relating to special deposits in banks disclose how extensively even in modern times this business has been and is carried on, and the general understanding in respect to it. The very act of Congress under which the National banks are organized recognizes the practice, and provides for the return of special deposits by National banks, even when required to suspend their general business. Section 46 of the act of 1864 provides that in certain events the banks shall cease to prosecute business, "except to receive and safely keep money belong to them, *and to deliver special deposits.*" This provision assumes that such banks will receive special deposits, and impliedly recognizes and sanctions their so doing by making express provision enabling them to return them at a time when they are prohibited from paying out to depositors funds held on general deposit.

The Vermont case referring to this provision says that it was not intended to extend the powers of the bank. Perhaps not; it rather indicates that the framer of the Bank Act assumed that banks have power to receive special deposits without any express authorization, and that it was an incident of the banking business, and would as such be exercised by the banks. It is further suggested that the term special deposits refers to securities held by the banks as collateral to loans. This interpretation is wholly inadmissible, such securities are in no sense deposits. The term special deposits has and always has had a well-known and defined meaning. In *Marine Bank v. Fulton Bank*, 2 Wall. 252, 256, MILLER, J., says: "All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money, peculiar to banking business, in which the depositor for his own convenience parts with title to his money and loans it to the banker." This description marks the distinction between the general and special deposits. In *Story*

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on Bailments, § 88, the same distinction is recognized and also in *Rawson v. Real Estate Bank*, 5 Pike (Ark.), 297. In the Vermont case itself at page 554, the court defines general deposits and says that at the time of the passage of the act, deposits in banks had a well-known and understood meaning and that the delivery of money securities or other property to be specially kept and re-delivered had been equally well-known as special deposits, and in *Turner v. First Nat. Bk. of Keokuk*, 26 Iowa, 562; Thomp. N. B. Cas. 454, the authority to return special deposits contained in section 46 is held to refer to deposits of securities for safe-keeping.

That it was understood at the time of the passage of the National Banking Act that the banks organized under it were authorized to receive special deposits, is further evidenced by a contemporaneous circular addressed to the banks by the eminent Comptroller of the Currency, H. McCullough in 1864, in these words: "In order to encourage economy and the habit of saving among the poor of the country and more especially of the large cities, it is suggested that the National banks act as custodians without charge of United States bonds and other representatives of value which that class of persons desire to leave with them for safe-keeping. Bank officers that approve of this suggestion will please give such notice of their willingness so to act, as is necessary for the information of the parties who are to be benefited." The Banking Act was passed and this circular was issued in the light of the decision in the case of *Foster v. Essex Bank*, which declared the extent of liability incurred by banks in respect to such deposits, a case often cited and well known, especially among those concerned in the business of banking. It cannot be doubted that it was well known to the framers of the act and the Banking Department, and there is nothing in the act or in the contemporaneous history to indicate that it was the policy or intention to establish any rule in respect to National banks different from that enumerated in that case.

On the question of corporate power, we are therefore of opinion that National banks have power to receive special deposits gra-

tuitously or otherwise, and that when received gratuitously they are liable for their loss by gross negligence.

The next question in the case is as to the authority of the teller to act for the bank in receiving the deposit in question. The evidence bearing on this point was that the bank had been accustomed to receive packages supposed to contain securities from various persons for safe-keeping; that Orrin Ballard was cashier of the bank and his son Leon Ballard was teller, but sometimes acted as cashier in the absence of his father; that Orrin Ballard had the management and control of the affairs of the bank. It did not appear that the president or directors took any part in its management or that the directors held any meetings. That some of the persons who left valuables in the bank for safe-keeping were directors. That at some time before the deposit in question a trust company was formed in Syracuse for the receipt of valuables for safe-keeping, and that after the formation of this company Mr. Ballard, the cashier, said to his son that they had better not take any more packages for safe-keeping, but the son says that this was not a positive instruction, but only an expression of opinion, and he afterward received packages. The son also testified that he told the plaintiff that his package would be at his own risk. This was contradicted by the plaintiff. The teller also testified that his father sometimes told persons depositing packages there that they would be at their own risk, but that on other occasions packages were received without such notice. The package of the plaintiff was left by him with the teller at the bank and remained there some two years before it was lost, being occasionally taken out by the plaintiff to cut off coupons, etc., and returned by him to the bank. The court submitted to the jury the question whether the teller had been authorized to receive such deposits, whether he did so in his individual capacity or in behalf of the bank, and whether he told the plaintiff that the package would be at his own risk and whether the teller had been directed to discontinue receiving deposits of securities, and instructed the jury that if the deposit was with the teller as an individual the plaintiff could not recover. We think the evidence was sufficient to justify the

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submission to the jury of the questions of the authority of the teller, and whether the deposit was with the bank in this manner, and that their verdict establishes such authority, and that the deposit was with the bank and not with the teller in his individual capacity. The entire management and control of the affairs of the bank having been left with the cashier, his acts and the authority conferred by him upon the teller must be deemed binding on the corporation.

The verdict thus establishing that the plaintiff's securities were received on deposit by the bank, it was bound either to return them or show some sufficient ground for not doing so. It claims that they were stolen from the safe by some person other than the employees of the bank, and the remaining question in the case is whether the theft was suffered through gross negligence of the bank in the care of the bonds. This question was submitted to the jury, and we think the evidence was sufficient to authorize such submission. There was no burglary, and no direct explanation of the circumstance of the loss of the bonds, but there is evidence in the case tending to show that if stolen the theft was committed in the day time while the bank was open. That the bonds were in a safe so situated as to be accessible to a person entering from the street; that the persons in the bank were so placed that at times the safe was not in their view, and that sometimes the door of the safe was left open. The jury could from the evidence have found that the theft was committed by some person entering from the street and finding the safe open, who abstracted the plaintiff's package without being observed by any one in the room, and that leaving the property thus exposed was gross negligence. There was some conflict and confusion in the evidence on these points, but these were matters exclusively within the province of the jury.

The fact that property of the bank was stolen at the same time from the same place is not conclusive against the allegation of gross negligence. *Dorman v. Jenkins*, 2 Ad. & Ell. 256; *Griffith v. Zippervick*, 28 Ohio St. 388; *Tracy v. Wood*, 3 Mason, 132; *Wilson v. McIntosh*, 1 Stark. N. P. 237.

These were all cases of gratuitous bailments and the question of

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gross negligence was left to the jury, notwithstanding that the bailee took the same care of the property as he did of his own which was stolen at the same time.

It has been argued on the part of the respondent that even assuming the receipt of special deposits to have been beyond the legal power conferred upon the bank by the law under which it was incorporated, yet that it having in fact received the plaintiff's property into its custody, it cannot set up its own want of corporate power as a defense to an action for not returning it, or for losing it by gross negligence. The conclusion which we have reached on the question of power renders it unnecessary to pass upon this point.

After a careful examination of the whole case we think the judgment should be affirmed.

All concur.

RHONER V. FIRST NATIONAL BANK OF ALLENTOWN, PENNSYLVANIA; PALMER V. SAME.

(14 Hun, 126.)

Attachment against National bank in another State.

An attachment will not lie before final judgment against the property in this State of a National bank situated and doing business in another State.*

APPEAL from orders vacating attachments. The opinion states the case.

F. A. Burnham, for appellants.

Peabody, Baker & Peabody, for respondent.

BRADY, J. The defendant as a bank organized under an act of Congress and located at Allentown, in the State of Pennsylvania, and the plaintiff herein being creditors and the defendants having property in this State, on application and proof of the facts stated, an attachment was issued. The defendant appeared

* See, *contra*, *Robinson v. National Bank of New Bern*, ante, p. 308.

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for the purpose of moving to discharge the attachment, on the ground that by act of Congress this court was prohibited from granting an attachment against such an association before final judgment, and the motion was made and was successful.

The appeal presents the question whether or not this relief was properly granted.

The precise question was considered in *Southwick v. First National Bank of Memphis*, 7 Hun, 96 ; Thomp. N. B. Cas. 789, and disposed of adversely to the defendant, but the subsequent corrections by the Revised Statutes of 1874, to sections 5242, 5198, were not considered in that case, the decision in which rested upon the effect of the phraseology of the section criticised in the case mentioned. It was there held that the prohibition related only to attachments against National banks in the place where they were located, and therefore this court had power to issue such process against a National bank, not located, but having property in this State. The amendment suggested, however, removes the obscurity which led to the decision mentioned, by making the inhibition so sweeping as to relate to all actions against such associations. In the case of *Central National Bank v. Richland National Bank of Mansfield*, 52 How. Pr. 136 ; Thomp. N. B. Cas. 801, Justice BARRETT considers the question here involved, and expresses by his opinion the difference between the provisions already considered. He arrived at the conclusion that an attachment could not be legally issued, and his judgment in that respect seems to be correct. Congress has declared that it should not be done. This provision in the act of Congress does not, however, affect the jurisdiction of this court over National banks. It limits only the exercise of authority by attachment, which is a provisional remedy, and not absolutely essential to jurisdiction, which may be acquired by other and independent modes under the Code, sections 134, 135. The decisions are unanimous as to the power to relieve National banks from the garnishee process, said BARRETT, J., in *Central National Bank v. Richland National Bank of Mansfield*, and this is all in effect that is done by the amendment suggested. It has frequently been held in this State, that the form of the remedy may be changed without vio-

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lating the provisions of our Constitution, and the protection of banks created by National authority from the destructive process of a State court when ample remedies are given by the Federal tribunal, is in no ways subversive of constitutional limitations. The States can exercise no control over National banks nor in any wise affect their operation except in so far as Congress may see proper to permit. *Farmers' Bank v. Dearing*, 91 U. S. 34; Thomp. N. B. Cas. 117. For these reasons the orders appealed from should be affirmed with ten dollars costs, and the disbursements of these appeals respectively.

DAVIS, P. J., concurred. Present, DAVIS, P. J., BRADY and INGALLS, JJ.

Orders affirmed.

NATIONAL BANK OF GLOVERSVILLE V. WELLS.

(15 Hun, 51.)

Indorsement by National bank and procural of discount — title to such paper.

A National bank agreed with the maker of notes to procure their discount for a commission, and indorsing them under an accommodation indorser, procured their discount by another National bank, before maturity, in good faith, and without notice. The notes being dishonored, the bank indorser took them up, and sued the accommodation indorser. *Held*, that the action was maintainable.

APPEAL from a judgment for the plaintiff on the report of a referee. The facts are stated in the dissenting opinion of TAPPAN, J.

James M. Dudley, for appellants.

Parkhurst and Baker, for respondent.

LEARNED, P. J. [Omitting other points.] The defendant further insists that the plaintiff cannot recover, because it is not the owner of the note in suit. The note is in plaintiff's possession, duly indorsed by the payee. That is sufficient *prima facie*. The defendants insist that the note was discounted by

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the First National Bank of Albany, and came into the plaintiff's possession only after protest; and that the plaintiff could not purchase this paper. *First National Bank of Rochester v. Pierson*, 24 Minn. 140; s. c., 31 Am. Rep. 341; Thomp. N. B. Cas. 637.

The note, however, when it was discounted by the First National Bank of Albany, had the indorsement of the plaintiff, by its cashier. That bank, therefore, taking the note in good faith, could look to the plaintiff as an indorser; and no reason is suggested why the plaintiff would not be liable after due protest.

If the plaintiff had then taken up the note, it could not be said that the plaintiff had purchased the note for speculation or for "note shaving." That is the kind of transaction condemned in the case last cited.

The case of *West St. Louis Savings Bank v. Parnelee*, cited by defendants, was where a cashier indorsed his individual note, adding his official title, without authority from the bank. It was held that this did not bind the bank. That has no application to the present case, where the act of the cashier was done by the authority of the plaintiff.

And it should be further noticed that the answers of the defendants do not allege any violation of the banking law other than usury. They do not allege any receipt by the plaintiff of a commission for indorsement. On the contrary, they allege a usurious discounting at twelve per cent. This point, therefore, urged by the defendants in the argument was not within the issues, except as the answer denies plaintiff's title to the note.

The plaintiff's title to the note does not depend on the alleged unlawful transaction. The plaintiff gets title through the First National Bank of Albany, a *bona fide* holder for value; and the plaintiff must be held to be the owner of the note, unless we adopt the principle that, under no circumstances, can a National bank get title to a note, except by discounting it.

The judgment should be affirmed, with costs.

TAPPAN, J., dissenting. I cannot concur in the opinion of the majority of the court in this case.

The plaintiff is a banking association, organized under the act of Congress of the United States, entitled "An act to provide a National currency, secured by pledge of United States stocks, and to provide for the circulation and redemption thereof," approved February 25, 1863, and June 3, 1864, and the several acts amendatory thereof, substantially re-enacted in title 62, page 992, Revised Statutes of the United States.

The evidence tended to prove, and the referee expressly found, that when the defendants Burr opened an account with the plaintiff the latter, by its cashier, agreed that the bank would discount for them to the extent of four or five times their average deposits; and if they should require discounts in excess of such amount, he would procure their paper to be discounted for them for a commission of five per cent per annum for his services. Under such arrangement several notes made by defendants Burr, and indorsed by the defendant Wells; and afterward indorsed by James M. Wood as cashier for the plaintiff, were forwarded to other banks, and by such other banks discounted at legal rates, the avails received by plaintiff, and the balance, after deducting five per cent, credited to said defendants Burr.

In reference to the note in suit, the referee made the following special findings:

Seventh. That on or about the 9th day of August, 1875, the defendants Burr made their certain other promissory note described in the complaint and upon which this action is brought, whereby they promised to pay in two months from the date thereof, to the order of defendant John E. Wells, at the Metropolitan National Bank, New York, the sum of twenty-four hundred dollars, which note was indorsed by the defendant John E. Wells, for the accommodation of the makers.

Eighth. That said note so indorsed was, on or about the 11th day of August, 1875, delivered by the defendants Burr to the plaintiff's cashier, for the purpose of having it discounted, and raising money thereon with which to pay the aforesaid note of \$1,995.45, and another note made by the defendants Burr of the amount of \$300, both of which were then held and owned by the plaintiff.

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Ninth. That said note of \$2,400, being the note described in the complaint, was thereupon indorsed by the said cashier of the plaintiff, and sent by him to the First National Bank of Albany to be by it discounted, and said bank received such note and discounted the same at the rate of seven per centum per annum for the time it had to run until the maturity thereof, as interest, and deducting such interest, remitted the said residue of the amount of such note to the plaintiff on or about the 16th day of August, 1875. * * * * *

Eleventh. That the plaintiff demanded and received from the defendants Burr out of the residue of the proceeds of such note, as a compensation for procuring the discount thereof, and for the loan of its credit by indorsing the same, the sum of \$14.67.

The note of \$2,400 was put in evidence as plaintiff's exhibit "A" upon the trial, from which it appears that the indorsement by Wood was as follows: "Pay A. Van Allen, cashier, or order. J. M. Wood, Cashier."

The referee has found that this note was not delivered to the plaintiff or its cashier as evidence of security for or under an agreement for a loan, made or to be made by plaintiff or its cashier. The note became due on the 12th day of October, 1875. Payment was then demanded at the Metropolitan Bank; and not being made it was duly protested at that bank, and by it returned to the First National Bank of Albany, and by the latter bank it was returned, with notice of protest, on the 14th or 15th of October, 1875, to the plaintiff, which thereupon took up the note, and brought this action thereon.

Upon the trial the defendants requested the referee to find: "That the plaintiff has no right or power as a corporation or banking association, under the law by which it is created, to sell or loan its credit by indorsement, or becoming surety for the accommodation of others, for a consideration or otherwise."

The referee declined to find upon the question, upon the ground that it was not involved in the decision, and defendants excepted.

The agreement made by Wood with the defendants Burr appears to have been made by him as cashier for plaintiff; the

indorsement of the note in suit was by Wood as cashier for plaintiff, and Wood says, in reference to the compensation taken for procuring the discount for the note in suit, and for the loan of its credit by indorsing the same, that he took nothing, that the bank took the \$14.67; and the referee, as appears by the eleventh finding above cited, reaches the same conclusion.

By the above exception the defendants raise the question whether the plaintiff, a National banking association, is authorized by law to receive paper, made to be indorsed by such association, to be discounted by another bank, for a compensation to be paid to it therefor. It is well-settled law that corporations created by statute must depend for their powers, and the mode of exercising them, upon the true construction of the statute itself. *Bank of U. S. v. Dandridge*, 12 Wheat. 88; *Head v. Providence Insurance Company*, 2 Cr. 127.

By subdivision 7, § 5136, R. S. of U. S., it is provided that these associations, after filing articles of association and an organization certificate, shall have power to exercise, by their board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes, according to the provisions of the act.

By section 5197 the rate of interest that these corporations are entitled to receive is prescribed, and by the next section a penalty for taking usurious interest is provided. Rev. Stat. of U. S. 1011.

The court of last resort in Maryland has determined that selling railroad bonds upon commission is not within the corporate powers of a National bank. *Weckler v. First National Bank of Hagerstown*, 42 Md. 581; s. c., 20 Am. Rep. 95; Thomp. N. B. Cas. 533.

In *First National Bank of Rochester v. Pierson*, it was held that the purchase of a promissory note by a National bank for

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the purpose of speculation is *ultra vires*, and the bank acquires no title to, and cannot recover on a note so purchased.

As was said in *Weckler v. National Bank of Hagerstown* these associations, when organized in their corporate name, are allowed to make contracts, sue and be sued, to elect directors and other officers, "and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, using and circulating notes, according to the provisions of this act."

"By it the associations are not simply incorporated as banks, and the scope of their corporate business left wholly to implication, but the kind of banking which they may conduct is limited and defined."

As we read the language of subdivision 7 of section 5136, it authorizes the association to carry on banking "by discounting and negotiating promissory notes," etc.; and to exercise "all such incidental powers" as shall be necessary to conduct *that business*. The mode in which the incidental powers shall be executed is not defined.

Under the act in question, the rate of interest allowed to be charged for loan and discounts is defined. The plain intent of Congress by this act was to secure to the public loans and accommodations at reasonable rates of interest, and to protect the shareholders of the banks, and the banks against the risk of loss from engaging in enterprises not incidental to the business of banking as defined in the act.

If one of the associations can lawfully make an agreement with a customer to obtain his note to be discounted by another association at the rate of interest allowed by law, and receive for indorsing and obtaining such discount five per cent per annum additional, can the spirit of the act to protect the public from extortion and usurious rates of interest for accommodation be enforced? If it is lawful for one of these associations to make such an agree-

ment and receive the fruits of it, would it ordinarily have money to loan to its customers for their accommodation?

If such a transaction is lawful; the temptation that the officers of these associations would be subjected to would tend to prevent discounting paper in a legitimate way by the bank applied to for such an accommodation, and tend to stimulate reciprocity among these associations in making discounts for each other, to secure a brokerage for procuring the discount and the loan of its credit by indorsing the note sent to the association applied to for discount.

If the First National Bank of Albany discounted the note in suit upon the indorsement of the plaintiff by its cashier, without knowledge of this agreement, its officers might lawfully presume that plaintiff lawfully acquired the note; and plaintiff would be liable to it upon the indorsement. Would it tend to protect the capital of the bank and the shares of the stockholders, to decide, that under this act one of these associations could pledge the credit of the bank, to enable it to obtain a brokerage for loaning its credit by indorsing customers' notes?

I am satisfied that Congress never intended to grant these associations any such power. I agree with the Supreme Court of Minnesota in its construction of the meaning of the word "negotiate," as used in this statute: that it is used to indicate not an act of purchase, but one of transfer, whereby the negotiated paper is passed by the owner or holder, and put into circulation. *First National Bank of Rochester v. Pierson*, 24 Minn. 140; s. c., 31 Am. Rep. 341; Thomp. N. B. Cas. 637; *Weckler v. First National Bank of Hagerstown*, *supra*.

Webster defines "negotiate," to sell; to pass; to transfer for a valuable consideration; as to negotiate a bill of exchange.

There is no just reason why these associations should not be allowed to sell and transfer notes by them in the ordinary transactions of their legitimate business, and the law intended to allow such sales and transfers, but does not admit of a construction that such language allows such associations to obtain a note by purchase for speculation, nor to engage in the business of indorsing notes to be discounted by other banks for a compensation. The First

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National Bank of Albany could have recovered upon the note as a *bona fide* holder without knowledge of the unlawful agreement to obtain plaintiff's indorsement. Plaintiff took up the note as indorser with full knowledge of the agreement, and therefore derived no additional rights from the title thus obtained.

For these reasons I am of the opinion that the plaintiff, having no corporate capacity to make the contract by which it obtained the note in suit, never acquired any title to it, or to recover the money paid for it; that said contract and the several acts of the plaintiff under it were strictly *ultra vires*, and conferred no rights whatever.

The judgment entered upon the report of the referee should be reversed, the order of reference vacated, and a new trial granted, costs to abide the event.

Present, LEARNED, P. J., BOARDMAN and TAPPAN, JJ.

Judgment affirmed with costs.

SEELEY V. NEW YORK NATIONAL EXCHANGE BANK.

(4 Abb. New Cases, 61.)

Reduction of capital — accumulation of surplus.

A National bank, reducing its capital, cannot retain, as a surplus or for any other purpose, any portion of the money which it received for retired stock, and having refused to permit shares thus retired to be transferred on its books, is liable for the value of the shares to the holder.

(New York Common Pleas.)

ACTION to recover value of retired bank stock. The plaintiff owned 25 shares of stock of the defendant, of the par value of \$2,500. The original capital stock was \$500,000, in 5,000 shares. It was resolved to reduce it to \$300,000 by returning \$100,000 to shareholders, and requiring them to relinquish two-fifths of their shares *pro rata* according to the amount they respectively held. The officers claimed to retain five shares of the plaintiff's stock, and refused to pay him the par value of two-fifths

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of his stock on his surrendering his certificate therefor, and refused to transfer his stock on the books unless he complied with the resolution.

Childs & Hull, for plaintiff.

John L. Brown, for defendant.

VAN HOESSEN, J. Section 5143 of the Revised Statutes of the United States provides that a National banking association may reduce its capital stock. The principal question in this case is whether a National bank may, after reducing the amount of its capital stock, retain, as a surplus or for other purposes, the whole or any portion of the money which it received for the stock that is retired? The defendant reduced its capital stock from \$500,000 to \$300,000. What is to become of the \$200,000 which was subscribed and paid for the stock that has been called in? Must it be paid to the stockholders who surrender the retiring stock, or may it be retained by the bank? A certificate of stock is merely the evidence of an interest in dividends as they are declared, and of a right to a *pro rata* distribution of the effects of the corporation on hand at the expiration of the charter. Angell & Ames on Corporations (8th ed.), § 560. If the defendant had determined to discontinue business and wind up its affairs, there is no doubt that the shareholders would be entitled to a distribution of whatever assets of the corporation might remain after its debts had been paid. If instead of surrendering all its corporate powers, a corporation, by reducing its capital stock, relinquishes a portion of them, it seems to me that the shareholders may properly claim a distribution of the money which the corporate body has no longer the right to use as capital. The abandonment by a corporation of all its corporate rights gives the stockholders a right to the distribution of all the net assets. Why should not an abandonment of a portion of these rights give the stockholders a right of distribution *pro tanto*? Of course, if the capital stock has been impaired, the amount to be returned to the stockholders must be diminished.

It is said that the capital of the defendant has not been im-

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paired, but that the directors deem it advantageous to retain, as a surplus, one-half of the amount which was subscribed and paid for the stock which has been called in. The reason assigned is not, in my opinion, any justification for withholding from the plaintiff his share of the money that was paid in exchange for the stock that is retired. That money was paid as capital, and if it be no longer needed for that purpose, and if it be not required for the payment of debts, it has accomplished the end for which it was subscribed, and it ought to be returned to the shareholders. The bank has gone out of existence as a corporation with a capital of \$500,000. Under a modified charter, it commences a new life with a capital of \$300,000. So far as the \$200,000 of reduced stock is concerned, the corporation must be considered as having surrendered its charter and wound up its business. This being so, there is no doubt as to the duty it owes to the stockholders who own the retired stock.

The able counsel for the defendant insists that it is discretionary with the directors either to return the money to the shareholders, or to retain it as surplus; and that by retaining it, the bank does the plaintiff no injury, inasmuch as his shares will increase in market value as they diminish in number, and he will own one two-hundredth part of the new capital stock just as he owned one two-hundredth part of the old capital stock. It is true that his proportion of the capital stock will relatively be as great as before the reduction; but it is altogether matter of conjecture as to the future market value of a share of the reduced stock. The return of the reduced capital to the shareholders is not, however, a subject for the exercise of a director's discretion. If the retired capital be a liability of the corporation in favor of the shareholders who give up the stock that is called in, the payment of the debt cannot lie in any man's discretion. Payment cannot be deferred because the directors believe it for a creditor's advantage to keep him out of his money.

When a dividend has once been declared, the directors cannot afterward refuse to pay it because they have determined to establish a surplus fund with a view to benefit the corporation and its stockholders. The dividend, when declared, becomes a debt, and

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cannot thenceforth be disposed of without the consent of him who is entitled to it. *Beers v. Bridgeport Spring Co.*, 2 Weekly Digest, 8. It would be strange if capital — capital which has accomplished its mission — could be diverted from its owners and used against their protest to build up a surplus fund, when even a dividend, once declared, cannot be.

The controversy in this case really is whether or not the defendant should be compelled to pay the plaintiff the value of five shares, the amount which the directors have determined to retain as surplus. If ordering judgment for the value of those shares would bring the litigation to a close, I should go no further than to make such an order. But it appears to be necessary to provide for the indemnification of the plaintiff for the loss of his twenty-five shares, the transfer of which the bank refused to make upon its books. If I should order judgment merely for the value of the five shares, it is possible that the defendant would refuse to give the plaintiff a new certificate for fifteen shares, and to pay him the \$500 which the directors have ordered to be paid to those who consent to relinquish two-fifths of their shares. To give the plaintiff complete redress, it seems to me to be necessary to order judgment for the value of twenty-five shares. The defendant is liable for that value, having refused to permit the shares to be transferred upon its books. I desire that the counsel for the defendant be served with a copy of the proposed findings.

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(75 N. C. 287.)

Taxation of shares — place of.

National bank shares, owned by residents, may be assessed at their residence or at the location of the bank, as the State legislature may direct, and a State law directing the assessment where the person required to list them resides is valid.

MOTION for an injunction. The opinion states the point. The injunction was granted below.

B. Fuller, for plaintiffs.

Guthrie & Caw and *W. F. Campbell*, for defendants.

SMITH, C. J. In the case of *Kyle v. Comm'rs of Fayetteville*, 75 N. C. 445; s. c., Thomp. N. B. Cas. 808, it is decided that the shares of stock held by non-residents in a National bank can only be taxed in the city or town wherein the bank is located. The decision rests upon the provision in the State Constitution by which all property, except such as may be exempted, is required to be taxed, and upon a clause in the act of Congress under which they are formed, permitting the State to impose upon the shares of stock a tax which shall not exceed that levied upon other moneyed capital in the hands of its own citizens, and restricting the tax on non-resident shareholders to the town or district in which the bank is located. A State cannot impose a tax upon these corporations as such, nor upon the property and interest of the shareholder therein unless authorized by Congress, and then only in the manner and to the extent allowed. The effect of the act for purposes of taxation is to sever the stock as property from the person of the owner, and to impart to it a new legal *situs*, that of the bank itself. Unless the shares of non-residents are taxed at the place where the corporation is formed, and their dividends intercepted and applied to the payment of the tax, they would be beyond the reach of the taxing power altogether. But by affixing to the property of the non-resident shareholder the *situs* of the bank itself, of whose capital his shares represent a part, his interest is subjected to the exercise of the taxing power, and through the corporation, as his trustee, the payment of his tax enforced out of his part of distributed funds.

But another and different question is now presented, not disposed of in the decision of that case. The plaintiffs here are citizens and residents of the State, some of them living in Cumberland, and others in Robeson, county, and none of them residing or doing business within the town, so as to subject their persons to its corporate jurisdiction. They are all liable to State and county taxation on their property of every kind, except lands and

farming utensils and other articles used in their cultivation at the places of their actual residence under the laws of the State.

The inquiry now is, whether the shares of resident stockholders can be assessed and taxed like those of non-residents in the town where the bank is located and carries on its business. The question will be first considered as affected or controlled by the legislation of Congress.

Soon after the passage of the National Bank Act a controversy arose as to the true meaning of the clause which permitted shares to be taxed under State authority "at the place where the bank is located and not elsewhere." In some of the States it was held that the restriction confined the exercise of the taxing power to the town or district in which the corporation conducted its business, while in others it was decided to apply to the State and not to any of its territorial divisions, and that such tax could be assessed upon a resident stockholder at the place of his residence wherever it might be within the State. *Burroughs on Taxation*, 127, 128; *Austin v. Aldermen of Boston*, 14 Allen, 359; *Clapp v. Bushington*, 42 Vt. 579.

The controversy was solved by an amendatory act passed in 1864, declaring the word "*place*" to mean the "*State*" wherein the bank is located. The only restraints imposed upon a State in the exercise of its taxing power over shares in National banks are:

1. That such tax shall not be at a greater rate than is assessed upon other moneyed capital in the hands of its individual citizens.
2. That the tax on shares of non-resident owners shall be imposed in the city or town where the bank is located.

Subject to these limitations, it is left to the legislature of a State to "determine and direct the manner and place of taxing all the shares" of banking associations within its limits. U. S. Rev. Stats., § 5219. It follows, therefore, that a State may prescribe and regulate under the restraints mentioned, as well the place as the manner of making its assessments upon this kind of property according to its own discretion. A reference to some adjudged cases will support this view.

In *Nat. Bank v. Commonwealth*, 9 Wall. 353; *Thomp. N. B.*

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Cas. 34, the State of Kentucky levied a tax "on bank stock, or stock in any moneyed corporation of loan or discount, of fifty cents on each share thereof equal to \$100," and required the cashier of the corporation to pay the tax, and the court held the enactment to be valid, and said: "If the State of Kentucky had a claim against a stockholder of the bank who was a non-resident of the State, it could undoubtedly collect the claim by legal proceedings, in which the bank could be attached or garnished and made to pay the debt out of the means of the shareholder under its control. This is in effect what the law of Kentucky does in regard to the tax of the State on bank shares." And the court further declared that "while Congress intended to limit State taxation to the *shares* of the bank as distinguished from its *capital*, and to provide against a discrimination in taxing such bank shares unfavorable to them as compared with the shares of other corporations and with other moneyed capital, it did not intend to *prescribe to the States the mode* in which the tax should be collected."

In *Tappan v. Merchants' National Bank*, 19 Wall. 490, Thomp. N. B. Cas. 100, the validity of an act of Illinois passed in June, 1867, was called in question. That act levied a tax on shareholders in banks formed under the authority of the United States or of that State, "in the county, town or district where such bank or banking association is located and not elsewhere, whether such stockholder reside in such county, town or district, or not." Chief Justice WARRE, delivering the opinion, says: "The State within which a National bank is situated has jurisdiction for the purpose of taxation *of all the shareholders* of the bank, *both resident and non-resident, and of all its shares*, and may legislate accordingly." The question then before the court was whether such property was not so annexed to and identified with the person of the owner as to exist only in contemplation of law where the owner was, and (except in case of non-residents expressly provided for in the act) could be made liable to public burdens at any other place. It was decided that a State might tax the stock of its own citizens, as the stock of non-residents was taxed, at the *situs* of the bank; and the court declined to give

an opinion as to whether such tax could be assessed elsewhere in the State.

In *Adams v. Nashville*, 95 U. S. 19; Thomp. N. B. Cas. 148, the construction of this clause again came before the Supreme Court, and it was alleged that an exemption, resulting from a statute of Tennessee which declared that no tax should be put on the capital of any bank, State or National, operated to impose a burden upon stockholders in National banks which was not put upon other moneyed capital belonging to individuals, and was in conflict with the provisions of the law. The court say: "That the act of Congress was not intended to control the State power on the subject of taxation," and that its plain intention "was to protect corporations formed under its authority from unfriendly discrimination by the States in the exercise of their taxing powers."

The law does not itself require the assessment of any tax upon shares in these associations. It places them under the taxing power of a State which may choose to exercise it, protected, however, against adverse discriminating legislation. There is no obligation to charge these species of property with the public burden imposed in the act, and if it exists, it is by virtue of our own Constitution and laws which require all property to be taxed, and upon a uniform rule. This brings us to the consideration of our own legislation on the subject.

The provisions of the Revenue Act (Laws 1874-'75, ch. 184), by which the facts of this case are governed, if not inconsistent with the Constitution, definitely determine the dispute. Some of these will be cited:

Section 6 requires land and personal property on farms used in cultivating them to be given in in the township wherein the land lies. Section 7 requires all other personal property whatever, "including moneys on hand or on deposit, credits, investments in bonds, stocks in National, State and private banks," etc., to be given in in the township in which the person so charged resides on the 1st day of April." Section 9 declares that the list of taxable property shall include (par. 6) "stocks in National and private banks, etc., and their estimated value." So in section 11, the cashier of each bank or banking association, whether State or

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National, is directed to give in to the "board of assessors for the township in which such bank or banking association is situated, all shares of stock composing their corporation, as agent for and in the name of the owners of said shares of stock who may be non-residents, and the deposits of all non-residents."

It is thus apparent that the general assembly has provided for the taxation of non-resident shareholders in National banks at the place of location of the bank, and is not only silent in regard to resident shareholders in that connection, but in preceding sections requires all stock of the latter to be listed and taxed at the owner's domicile. As more clearly indicative of the legislative will, the last Revenue Act directs such cashiers to forward a list of stockholders resident in the several counties to the commissioners of the respective counties in order that this property may not escape taxation.

But it was urged in the argument of defendant's counsel that this method of taxing is not uniform inasmuch as the shares of resident and non-resident stockholders are taxed at different places and necessarily at different *ad valorem* sums, but this is a misconception of the uniformity prescribed. Absolute equality is unattainable in any system of raising revenue. "All persons," in the language of Chief Justice WATTE, in *Tappan v. Merchants' National Bank*, "owning the same kind of property are taxed as he (the complaining shareholder) is taxed." It is difficult to see how a tax upon all stock (except that of the non-resident which unless taxed through the association could not be taxed at all) levied and collected at the owner's residence can be unequal or wanting in uniformity, which as the chief justice in the case cited declares, is but another name for equality. Shares in National banks are assessed upon the same *ad valorem* principle, and pay the same tax as shares in every other moneyed association, and indeed as other forms of property whose locality is that of the owners. The exceptional fact is the addition of property belonging to non-residents to the volume of taxable property, which in this mode only can be brought within reach of the taxing power. But this does not disturb the uniformity of the system prescribed by the Constitution, and under which every

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person is taxed alike, upon land and such articles as are used in farming at the place where they are ; upon other personal estate where the owner resides.

We have examined the cases cited by the defendants' counsel, — *Bank of Columbus v. Hines*, 3 Ohio, 1, and *Township v. Talcott*, 19 Wall. 666, and do not find them at all in conflict with our opinion as to the uniformity intended in the Constitution, but rather in its support. Substantially the same views are expressed in both cases, and we will only refer to what is said in one of them.

In discussing a clause in the Constitution of Michigan directing its legislature to provide a uniform rule of taxation, Mr. Justice SWAYNE uses this language: "The object of this provision was to prevent unjust discrimination. It prevents property from being classified, and taxed as classified by different rules. All kinds of property must be taxed uniformly or be exempt. The uniformity must be co-extensive with the territory to which the tax applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout such county or city." Our revenue system is in entire harmony with these views.

We have discussed the subject of State and county taxation because the charter of the town of Fayetteville confers upon its municipal authorities the same powers of taxation, and on the same subjects of taxation within its jurisdictional limits, which the State itself possesses. Nor do we find it necessary to consider the extent of the powers of the defendant Mallet, as town tax collector, after the expiration of his term of office, to proceed with the collection of taxes.

We are therefore of opinion, and so declare, that the shares in National banks owned by residents of this State may be assessed under the act of Congress, either at the place where such owners reside or at the place where the bank is located, as the legislature of a State may elect ; and that under existing laws, such shares must be taxed, and can be taxed only at the place where the owner or person who is required to list them resides. The tax attempted to be enforced against the plaintiffs is imposed without

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authority of law, and is void; and the plaintiffs are entitled to relief by injunction.

No error.

PER CURIAM.

Judgment' affirmed.

 MOORE V. MAYOR AND COMMISSIONERS OF FAYETTEVILLE.

(80 N. C. 154; 30 Am. Rep. 75.)

Tax on National bank stock.

A statute empowering the authorities of a town to impose the same taxes, for municipal purposes, upon non-residents pursuing their ordinary avocations within the corporate limits as upon the inhabitants, with a *proviso* that non-residents so taxed shall have the right to vote at municipal elections, is not abrogated by a change in the State Constitution which deprives the non-resident tax payer of his vote, and authorizes a tax upon the shares in a National bank, located in the town, and held by one who conducts his ordinary business therein, but whose residence is in the county, outside the corporate limits.

MOTION for injunction to restrain the collection of a tax. The plaintiff resides near to and outside the corporate limits of Fayetteville, but conducted and carried on business as a merchant within the town. He was president of the People's National Bank, also located in the town and owned stock therein, on which the corporate authorities levied and attempted to collect an *ad valorem* tax, such as is assessed upon similar property possessed by resident owners. The court below denied the motion, and the plaintiff appealed.

B. Fuller, for plaintiff.

N. W. Ray, for defendants.

SMITH, C. J. By an act of the general assembly amendatory of the act of incorporation, and ratified May 20, 1864, § 4, it is declared that the mayor and commissioners of Fayetteville are hereby empowered to impose the same taxes, for municipal purposes, upon all persons whose *ordinary avocations are pursued*

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within the corporate limits of the town, although *resident beyond the corporate limits*, in like manner and to the same extent as upon persons resident within the corporate limits; *provided*, that non-residents thus taxed shall have the right to vote at municipal elections.

In *Buie v. Commissioners of Fayetteville*, 79 N. C. 267 (*ante*), it is decided that shares of stock in National banks, held by persons residing in the State, are subject to taxation in the county of the owner's residence as part of his personal estate, and not elsewhere for State and county purposes. The present case presents the question whether such stock, owned by one whose residence is just outside but whose business is within the corporate limits, may be taxed for municipal purposes in like manner as if his residence was also in the town. As the place and manner as well as extent of taxation of its citizens are regulated by the laws of the State, the solution of the question must be found in the proper interpretation to be put upon the clause of the amended charter, and in our opinion, is free from all reasonable doubt. The words are direct and positive, that such property as is held by the plaintiff shall be subject to the burden of municipal taxation. The intention and the effect of the act are to make such a person, for purposes of taxation, an actual resident of the town. We have said in the case referred to, that resident stockholders in National banks might be taxed where the legislature directed, and they are here subjected to municipal assessment in the town. In this respect the plaintiff is made to share in the burdens, as he does in the advantages of a town residence, and we see no reason why he should not.

It is contended, however, that the *proviso* conferring the right to vote and participate in the management of municipal affairs has been superseded and annulled by the Constitution of 1868, and that this political privilege is so associated with the liability that the repeal of the one is the extinguishment of the other. We do not so construe the section. The electoral right is conferred on such as may constitutionally exercise it, but is not an inseparable condition of taxation. Persons under age, and women in the situation of the plaintiff, may be assessed and yet they cannot vote.

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If further restrictions are imposed by the organic law upon the electoral franchise, reducing it within narrower bounds or withdrawing it altogether, if such be the effect of the Constitution, from the class to which the plaintiff belongs, this does not annul the authority to impose the tax. There is no such necessary connection between the liability created in the body of the section and the privilege conferred in the attached proviso, that the former may not remain without the latter. If the Constitution denies to the plaintiff the right to vote for officers of the town government for want of actual residence within its boundaries, he shares in other municipal privileges and is not exempt from the common burden by which these privileges are secured to himself and others.

It was suggested in the argument that the tax is levied as well to pay the corporate debt as to provide for the current expenses of the town government, and the first are not "for municipal purposes" within the meaning of the act. It is quite as much the duty of the authorities, in exercising the power of taxation, to provide for an existing legal obligation as for the expenses of governing the town and managing its affairs, and both are "for municipal purposes." The words are broad and comprehensive, looking to every legitimate use to which the moneys levied can be properly applied. The maxim invoked, in aid of the argument, that taxation and representation go together, has no application to individuals, but to political communities as such. Otherwise non-residents would escape all taxes whatever.

No error.

Affirmed.

Hade, Receiver, v. McVay.

HADE, Receiver, v. McVAY.

(31 Ohio St. 281.)

Usury — jurisdiction of State courts — set-off against receiver — penalty cannot be set off.

State courts have jurisdiction of actions against National banks for penalties and forfeiture prescribed by act of Congress for exacting usurious interest.* A right of set-off, perfect and available against a bank at the time of the appointment of a receiver, may be pleaded in an action by the receiver. In an action on a note discounted by a National bank, the defendant cannot set off the penalty of twice the amount of interest paid on other loans.†

ACTION by the receiver of the First National Bank of Mansfield against McVay, Allison & Co., drawers, and Walter Glenhill, accommodation acceptor, of a bill of exchange indorsed to the bank. The answer alleged that the bank having full knowledge that Glenhill was only an accommodation acceptor in discounting the bill reserved usurious interest. Also, that during the two years then next preceding, McVay, Allison & Co. had borrowed from the bank other sums of money, the bank in each case knowingly reserving and receiving, and the borrowers paying usurious interest. These alleged usurious transactions were particularly set out in the answer. The defendants prayed that the interest agreed to be paid on the bill in suit be adjudged forfeited, and that they recover by reason of such other usurious loans twice the amount of the interest paid thereon, and that that sum be applied by way of set-off to the plaintiff's claim.

To the set-off the plaintiff demurred. The demurrer was overruled, the interest agreed to be paid on the bill was adjudged forfeited, and the amount of interest paid on said independent loans was ascertained, and twice its amount set off against the plaintiff's claim.

Geddes, Dickey & Jenner, for plaintiff in error.

Dirlam & Leyman, for defendants in error.

* See, also, *Ordway v. Cent. Nat. Bank*, Thomp. N. B. Cas. 559, *sed quare*; *Missouri River Telegraph Co. v. First Nat. Bank*, id. 401; *Newell v. Nat. Bank*, id. 501.

† See *Huttermister v. First Nat. Bank*, Thomp. N. B. Cas. 741; *Brown v. Sec. Nat. Bank*, id. 869; *Wiley v. Starbuck*, id. 436.

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BOYNTON, J. The rights of the parties became fixed before the approval of the Revised Statutes of the United States; and in so far as the case is affected by the National Banking Act, it is governed by the act of 1864.

Section 30 of that act, among other things, provided that the banking association might take and reserve, on any loan or discount made, * * * interest at the rate allowed by the laws of the State where the bank was located, and that "the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

The position of the plaintiff is, that the liability created by the provisions of this section was strictly penal, and that an action to enforce it is cognizable only in the courts of the United States. This claim is founded on the provisions of the act of Congress of 1789 (1 Stats. at Large, 77, § 10; see U. S. R. S., § 711), which declares that the jurisdiction vested in the courts of the United States, in suits for penalties and forfeitures incurred under the laws of the United States, shall be exclusive of the courts of the several States.

If the question of jurisdiction depended for its solution on this provision alone, the position contended for would seem to be well founded. But since its enactment Congress has, in many instances, professed in direct terms to invest State tribunals with power to enforce penalties incurred exclusively in the violation of the laws of the United States. *Claflin v. Houseman*, 93 U. S. 130. By section 57 of said National Banking Act, it was provided "that suits, actions and proceedings against any association, under this act, may be had in any circuit, district or territorial court of the United States, held within the district in which such associa-

tion may be established; or in any State, county or municipal court in the county or city in which such association is located, having jurisdiction in similar cases."

By this provision the impediment to the exercise of jurisdiction by the State tribunals, created by the act of 1789, was removed, and the consent of Congress expressly given to the exercise of jurisdiction by the State courts, if competent to receive it, concurrent with that of the Federal courts, in suits, actions and proceedings arising under the Banking Act. Whether the same assent was given by section 8, it is unnecessary to consider. But it is said, if it be held to have been the purpose of Congress to clothe the judicial tribunals of the States with jurisdiction to hear and determine causes arising under the Banking Act, that there still remains lying back of the fact of jurisdiction, and upon which the fact depends, the question of capacity or power to take. And many cases are cited affirming the incapacity of State courts to receive and exercise jurisdiction to enforce a forfeiture or penalty imposed for a violation of the laws of the United States. But the doctrine of these cases has been repeatedly disapproved and rejected. *Gilman v. Philadelphia*, 3 Wall. 713; *Ex parte Niel*, 13 id. 240, and *Claflin v. Houseman*, *supra*.

In the case last cited it was held that the statutes of the United States are as much the law of the land in any State as are those of the State, and although exclusive jurisdiction may be given to the Federal courts, yet where it is not so given, either expressly or by necessary implication, the State courts, having competent jurisdiction in other respects, may be resorted to.

In delivering the opinion in that case, Mr. Justice BRADLEY says: "Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights, and not restrained by its constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts competent to decide

rights of the like character and class ; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. See remarks of Mr. Justice FIELD, in *The Moses Taylor*, 4 Wall. 429 ; and STORY, J., in *Martin v. Hunter's Lessee*, 1 Wheat. 334 ; and Mr. Justice SWAYNE, in *Ex parte Niel*, 13 Wall. 236. This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court." See, also, *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383 ; *Thomp. N. B. Cas.* 77 ; *Farmers and Mechanics' National Bank v. Dearing*, 91 U. S. 34 ; *Thomp. N. B. Cas.* 17.

These cases resolve the question of jurisdiction to enforce the forfeiture against the plaintiff, and fully settle the right of the State tribunals to entertain the action to recover the penalty given by the act of Congress, if competent by their own Constitution to hear and determine like questions or causes arising under State laws.

It is urged, in the second place, that the court below wrongfully entertained the cross-action of the defendants to recover the penalty, the principal action being brought by a receiver and not by the bank ; that the act of Congress, authorizing actions to be brought in State courts under the Banking Act, limits the right to actions against the bank, and that the alleged set-off, if available in an action by the bank, is not, and cannot be made available in an action brought by a receiver appointed by the Comptroller of the Currency to wind up its affairs.

This objection is not well founded. "When cross-demands have existed between persons under such circumstances, that if one had brought an action against the other a counter-claim or set-off could have been set up, neither can be deprived of the benefit thereof by the assignment or death of the other, but the two demands must be deemed compensated so far as they equal each other." Civil Code, § 99. The receiver holds to the bank

and its creditors the relation, substantially, of a statutory assignee. A right of set-off, perfect and available against the bank at the time of his appointment as receiver, is not affected by the bank's insolvency. He succeeds only to the rights of the bank existing at the time it goes into liquidation. *American Bank v. Wall*, 56 Me. 167; *Miller v. Receiver of Franklin Bank*, 1 Paige, 444; *Colt v. Brown*, 12 Gray, 233.

This question, however, is relieved of importance in the present controversy by the disposition made of the question relating to set-off. Was the cause of action to recover back twice the interest paid one arising upon contract within the meaning of that term as employed in section 97 of the Code of Civil Procedure?

That section is as follows: "A set-off can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract or ascertained by the decision of the court."

The action to enforce the forfeiture was, by the act authorizing it, denominated "an action of debt."

By the Revised Statutes, section 5198, it is now denominated "an action in the nature of an action of debt." In the division of forms of actions at common law into actions *ex contractu* and *ex delicto*, debt was included in the former class; and therefore it is contended that an action of debt is an action necessarily arising upon contract. But this does not follow. Debt was almost uniformly the remedy on statutes, either at the suit of the party aggrieved or of a common informer, and in many actions confessedly not sounding in contract. 1 Chitty's Pl. 125-8 *et seq.*; *C. and A. R. R. Co. v. Howard*, 38 Ill. 414.

It is quite manifest, in the case at bar, that there was no express promise by the bank to pay back any part of the interest received. That express assent was given to pay double the interest is not pretended. If therefore a contract or promise exists at all, it is because the law implies it from the circumstances, or imperatively presumes it from the relation shown between the parties. *Hertzog v. Hertzog*, 29 Penn. St. 465; 2 Greenl. Ev., § 102.

It is not denied that there is a large class of contracts which rest merely on construction of law and in which there is, strictly

speaking, no agreement of the parties to the terms by which they are bound. 1 Chitty on Cont. 79.

But it is said in Metcalf on Contracts, 5, that, "in sound sense, divested of fiction and technicality, the only true ground on which an action upon what is called an implied contract can be maintained is that of justice, duty and legal obligation;" and it is further said, as an instance of the application of the rule, that "if one has another's money, which in equity and good conscience he ought to restore, the law is said to imply a promise to restore it." Id.

In many of the States and in England, a borrower having paid usurious interest can maintain an action to recover it back. The cases holding that such action is founded on an implied promise of the lender to restore the sum illegally exacted. The principle asserted is, that title to the excess of interest paid never vested in the lender. And having another's money, which he ought in equity to restore, an action for money had and received will lie to recover it. *Williar v. Baltimore Butchers' Loan Association*, 45 Md. 546; *Wheelock v. Lee*, 64 N. Y. 242; *Thomas v. Shoemaker*, 6 W. & S. 179; *Ewing v. Griswold*, 43 Vt. 400; *Basanquette v. Dashwood*, Cas. temp. Talbot, 38; *Walker v. Chapman*, Loft. 342; *Jones v. Barkley*, Doug. 696; *Browning v. Morris*, Cowp. 792; *Williams v. Hedley*, 8 East, 377.

It is claimed that these cases, in principle, settle the question, that the several causes of action interposed below, as set-offs, respectively arise upon contract. But it is quite obvious that they do not have the effect contended for.

In the first place, the rule thus recognized does not go to the extent claimed, and secondly, it does not prevail in this State. *Shelton v. Gill*, 11 Ohio, 417; *Commercial Bank of Cincinnati v. Reed*, id. 498; *Baggs v. Loudenback*, 12 id. 153; *Spalding v. The Bank of Muskingum*, id. 545; *Rains v. Scott*, 13 id. 107; *Graham v. Cooper*, 17 id. 605. Whether well or ill-founded, the rule is firmly settled, that the party paying is *in pari delicto* with the party receiving, and hence is denied an action at common law to recover back the interest paid in excess of the legal rate.

It may be said that the rule denying the action in such case

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does not go to the extent of denying the existence of a cause of action arising upon contract, in favor of the borrower against the lender, but that it merely affects or cuts off the remedy as a punishment of the borrower for participating in the illegal transaction. But if we grant this, the proposition cannot be successfully maintained upon any sound principle, nor is it sanctioned by any authority known to us, that an action upon a statute for twice the entire interest paid is an action arising upon contract. No one of the cases above cited sustains or supports the alleged right to recover upon a promise implied in law, more than the amount paid in excess of the legal rate. They rest upon the ground that such excess is the money of the borrower in the hands of the lender; but that the borrower's equity, which gives rise to implication of a promise, is fully satisfied when that sum is restored to him, which was wrongfully taken from him, is clearly deducible from the principle adjudged.

The original act of February, 1863 (12 U. S. Stat. 678, § 46), in case illegal interest was taken or reserved, forfeited the entire debt. The act of 1864 reduced the sum to be forfeited to double the interest received. Both provisions were penal, differing only in the sum declared forfeited. Numerous decided cases hold that the repeal of a statute creating a penalty or forfeiture takes away the right to enforce it. *Oriental Bank v. Freeze*, 6 Shep. (Me.) 109; *Eaton v. Graham*, 11 Ill. 619; *Sumner v. Cummings*, 23 Vt. 427; *Washburn v. Franklin*, 35 Barb. 599; *Engel v. Schurtz*, 1 Mich. 150; *Cummings v. Chandler*, 26 Me. 453.

That this would not be the result from a repeal of the statute creating the liability, if the cause of action arose upon contract, is established by a like uniform current of authorities. *Williar v. Baltimore Butchers' Loan Association*, 45 Md. 546; *Dash v. Van Kleck*, 7 Johns. 477; *Wright v. Hawkins*, 28 Texas, 452.

The principle is clearly illustrated in *Williar v. Baltimore Butchers' Loan Association*. The plaintiff brought an action to recover back usurious interest paid, the statute declaring that a person contracting for usury should forfeit the excess above the legal rate. While the action was pending, an act was passed by the legislature taking away the right of action for usury in all

cases where the same had been paid. It was contended by the defendant that this act took away the right of the pending action; but the court held that the plaintiff's right in such cause of action was a vested one, which the legislature was wholly incompetent to take away. The decision was placed on the ground that the excess of interest which the act first mentioned authorized to be recovered back was not a forfeiture or penalty, but was money belonging to the plaintiff, in the hands of the defendant, the right to recover which existed independently of the statute, and could not be impaired or affected by its repeal. "A vested right of action is property in the same sense in which tangible things are property, and is equally protected from arbitrary interference. Where it springs from contract, or from the principles of the common law it is not competent for the legislature to take it away." Cooley's Const. Lim. 362, and note.

In *Oriental Bank v. Freeze*, *supra*, it is said: "Where a party, by statute provisions, becomes entitled to recover a judgment, in the nature of a penalty, for a sum greater than that which is justly due to him, the right to the amount which may be recovered does not become vested until after judgment." In *Lucas v. Government National Bank*, 78 Penn. St. 228, Thomp. N. B. Cas. 872, a case quite nearly in point, where the penalty given by the act creating it was sought to be used as a set-off, the court say: "Technically the latter part of the affidavit of defense is bad, for it claims as a set-off that which the act of Congress imposes a penalty on the usurious transaction, to wit, double the amount of the interest paid. In this the defendants had no such interest as would enable them to use it by way of defalcation, for it could be acquired only through an action of debt, under the statute, and until the forfeiture was pronounced in their favor, by judgment of the court, they had nothing therein which would be the subject of set-off." To the same effect is *Overholt v. National Bank of Mt. Pleasant*, 82 Penn. St. 490; Thomp. N. B. Cas. 883. In *Bank of Chambersburg v. Commonwealth*, 2 Grant, 384, it was held that "a penalty for breach of a statute is not, when sued for, within the defalcation acts, nor subject to any manner of set-off."

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Without pursuing the subject further, in our opinion the court properly adjudged the interest reserved on the bill in suit forfeited, and improperly held that the penalty imposed by the act of Congress for receiving usurious interest on other and independent loans was available as a set-off.

Judgment reversed, demurrer to the set-off sustained, and judgment for the plaintiff.

BANK OF CADIZ V. SLEMMONS.

(34 Ohio St. 142; 32 Am. Rep. 364.)

Usury.—loan to director — estoppel.

Where a National bank makes to one of its directors a loan of money, which in amount and in the rate of interest is in contravention of the National Banking Act, the borrower is not estopped to defend against a recovery of interest.

If a payee take from the maker a promissory note, and at the same time surrender the maker's note of an earlier date given for a loan of money, the facts, and not merely what the payee called or considered the transaction, will determine whether it was a renewal or payment of the original loan.

In rendering judgment on a promissory note given to a National bank, in renewal, into which note illegal interest on the original note was incorporated, the whole interest of both notes will be disallowed.

Payments made generally on a promissory note to a National bank, which note embraces illegal interest, will be applied in satisfaction of the principal.

PROCEEDING to modify judgment. The judgment was on promissory notes, executed to the plaintiff, a National bank. The defendants alleged that the judgment embraced illegal interest. The court found "that said note for \$10,066.37, to the bank, of the date of January 9, 1871, did 'carry with it,' within the meaning of section 30 of the act of Congress, under which the plaintiff was established, the interest calculated on the former notes, amounting to the sum of \$625.14, and which sum must be here held and adjudged to be forfeited under the law; and that the payments made on the note above stated must be applied exclusively to the payment of the principal of the note exclusive of any interest. The court therefore finds that the amount le-

gally due on said note on May 23, 1873, the day on which the judgment by confession was entered herein against the defendants, was \$3,268.30."

"Thereupon it is considered and adjudged that the original judgment rendered in this case, by confession, on May 23, 1873, be and the same is hereby modified, so as to stand as a judgment for \$3,268.30, instead of its original amount of \$4,581.85."

Evidence was given by the bank tending to show that the original notes were paid off, and that the note for \$10,066.37 was given for a new loan and not as a renewal of the other loans. On the other hand, Thomas, one of the defendants, who was a director of the bank from 1863 until after the last-mentioned note was negotiated, testified that the new note was given as a renewal of the original loans. The plaintiff brought error.

Lewis Lewton, for plaintiff in error. Section 30 of the National Banking Act creates a forfeiture, and hence must be strictly construed. *Bank of Canton v. Brainerd*, 8 Ohio, 292; *Hall v. State*, 20 id. 8. The law applied the payments to the interest. *Miami Eas. Co. v. Bank U. S.*, 5 Ohio, 260; *Hammer v. Nevill*, Wright, 169; *Connecticut v. Jackson*, 1 Johns. Ch. 17; *Stoughton v. Lynch*, 2 id. 213; 1 Pick. 4.

J. M. Estep, for defendants in error.

OKEY, J. Three questions are presented. First, as to the amount legally due on the note; secondly, whether the court erred in excluding certain evidence; and thirdly, whether there is error in the judgment as to costs.

1. There is conflict in the evidence, but it is with respect to immaterial matters. True, an officer of the bank testified: "We did not think of renewing any old debts. The question of the amount due on the old notes, or of renewing them, was not before us, or considered by the board at all. There was no agreement to renew, but only to loan." But when the facts are considered, they fully support the finding that the real transaction was simply a renewal of usurious loans.

Where interest at a rate exceeding that allowed by law is re-

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tained or stipulated for, the contract is, under the laws of this State, invalid only as to the excess; while under the 30th section of the National Banking Act, "the statute operates on the instrument given for the loan, and in effect, declares it to be invalid as to the entire interest, but valid and binding as an obligation for the payment of the principal." *First National Bank v. Garlinghouse*, Thomp. N. B. Cas. 811; *Shunk v. First National Bank*, 22 Ohio St. 492-502, 508; Thomp. N. B. Cas. 820; *Hude v. Mc Vay*, 31 id. 231; *ante*, p. 353. But it has been decided that under the laws of this State, in an action on a note given in renewal, where the original note embraced illegal interest, the consideration may be inquired into, and the illegal interest deducted. *Baggs v. Loudenback*, 12 Ohio, 153. And see Tyler on Usury, ch. XXX. The same principle applies in cases arising under the National Banking Act (*Overholt v. National Bank*, 82 Penn. St. 490; Thomp. N. B. Cas. 833), though, as we have seen, in those cases the whole of the interest must be deducted.

Under some circumstances, no doubt, one note is regarded as merged in, or discharged or satisfied by another, so that no suit can be brought on the former; while in others, the right to sue on an original note is unaffected by the execution and delivery of another note, based on the same consideration. But the principle of those cases has no application here. The inquiry in this case is whether the real transaction was an extension of the time of payment of the original loans; and it is quite clear to us that it was. It is also clear, as matter of law, that none of the notes could bear interest, for the reason that their interest-bearing power was destroyed by the illegal agreement; and therefore payments made generally could only apply to the principal. The court below proceeded on that principle in ascertaining the amount due to the plaintiff, and hence the finding is correct. The case is wholly unlike *Shinkle v. First National Bank*, 22 Ohio St. 516; Thomp. N. B. Cas. 824; and the cases in which payments, made generally, have been applied first to the payment of interest, have, for the reason stated, no application here.

[Omitting the second point.]

Recurring in this connection to the defense, it is clear that

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Thomas, the principal in all the notes, was no more estopped from setting up the illegality, by reason of his position as director, than if he had not been officially connected with the bank. *Goudy v. Gebhart*, 1 Ohio St. 262. It is equally clear, that notwithstanding the unauthorized character of the loan, his contract to pay the principal may be enforced. *Gold Mining Co. v. National Bank*, 96 U. S. 640; *Thomp. N. B. Cas.* 151.

[Omitting a technical point.]

Judgment affirmed.

APPEAL OF SECOND NATIONAL BANK OF TITUSVILLE.

(85 Penn. St. 528.)

Usury — fraud on creditors.

Neither under the National Banking Act nor the Pennsylvania Usury Act of 1858 is the taking of more than six per cent interest a fraud upon creditors in itself.

THE opinion states the case.

Roger Sherman, for appellant.

Guthrie & Byles, for appellees.

PAXON, J. This controversy has arisen in the distribution of the proceeds of a sheriff's sale of the real estate of Zephaniah Waid. At the date of the sale, the Second National Bank of Titusville held a judgment amounting to \$2,156.12, and William M. Henderson was plaintiff in a judgment for the use of the same bank, amounting to \$1,879.73. Waid became the indorser of a note of Shugert & Starr to the bank for \$2,500, on the 18th of December, 1872. In a suit subsequently brought on it, judgment was obtained on the 20th of May, 1873. Before the note was given, interest at the rate of ten per cent had been paid by Shugert & Starr on the debt it represented, to the amount of \$125.68. When it was given, on the 18th of December, 1872, a discount at the rate of twelve per cent, amounting to \$77.50, was

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retained. It was the second renewal of a note originally given on the 30th of May, and first renewed on the 6th of September, 1872. It was only at the date of the second renewal that Waid became indorser. Upon the proof that usurious interest had been reserved, the auditor decided that "the interest-bearing power of the obligation had been destroyed," and "as there was no point of time in the history of such paper at which it could be freed from the taint of illegality, so it followed that there could be no point of time from which it would bear interest." Under the view of the law thus taken in the report, the costs, the attorney's commission of five per cent, stipulated for in the note, charges for protests, and all interest accrued on the original note and its renewals, and on the judgment, were excluded from the allowance made to the bank. There were also deducted the interest, attorney's fees, and costs accrued in a judgment on a note for \$1,700, made up in part of an independent note for \$1,500, previously discounted, and in part of interest and costs of the judgment obtained on the note of Shugert & Starr. On the same ground of usury, the sum of \$111.99 was deducted from the Henderson judgment. These rulings of the auditor were affirmed by the court, upon exceptions.

[Omitting immaterial points.]

The appellant in this case is a National bank. Section 5197 of the Revised Statutes allows such banks to charge and receive such rate of interest as is authorized by the laws of the State where the bank is located, and section 5198 provides that:

"Knowingly taking, receiving or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon."

Thus it will be seen that under the act of Congress no interest can be recovered upon a usurious contract, while by the law of this State the legal interest can be recovered, but no more. While the former uses the word "forfeiture," and is penal to the extent of the interest, it does not make the entire contract void or even voidable. If under our act of 1858 it is not a fraud *per se* upon creditors for a debtor to pay more than the legal rate of interest, it

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would be straining the law to say that it is so under the act of Congress. The whole question of interest is regulated by our own statute. The act of Congress applies only to the National banks, and as to them the rate of interest conforms to the State law.

Where creditors allege that usury is a fraud upon them they must do more than show the payment in the usual course of business of interest in excess of the legal rate. That is a matter of which the debtor alone can complain. In the case in hand there was nothing to show collusion to defraud creditors. It follows that they had no standing before the auditor to set aside the appellant's judgment.

Even in view of the record as it was made up by the auditor, the case did not justify the charging the costs of the distribution upon the appellants. The questions were fit to be raised, and the position of the appellants entitled them to raise them.

The decree of the Common Pleas is reversed, and it is now adjudged and decreed that the fund in court be applied first to the costs of the distribution; secondly, to the city's claim for taxes, sewer and paving assessments; and thirdly, to the judgments in their order for the amounts shown by the record to have been due upon them respectively at the date of the sheriff's sale; the costs of this appeal to be paid by the appellees.

BLETZ V. COLUMBIA NATIONAL BANK.

(87 Penn. St. 87; 30 Am. Rep. 343.)

Jurisdiction of State courts to recover illegal interest.

State courts have jurisdiction of actions to recover illegal interest reserved by National banks upon loans.*

ACTION of debt to recover double the amount of illegal interest or discount paid by plaintiff on loans by the defendant, &

* See to same effect, *Ordway v. Cent. Nat. Bank of Baltimore* (47 Md. 217), 23 Am. Rep. 455; *Thomp. N. B. Cas.* 559; *Dow v. Irasburgh Nat. Bank of Orleans* (50 Vt. 112), 23 Am. Rep. 493; *post*; *Gruber v. First Nat. Bank of Clarion*, 87 Penn. St. 465; *post*.

National bank. The opinion sufficiently states the case. The defendant had judgment below.

J. F. Frueauff, Samuel Reynolds and George M. Kline, for plaintiff in error.

H. M. North, for defendant in error. The exaction of twice the amount of interest is a penalty. Burrill's Law Dictionary, *Penalty*; Curtis' Com., § 247; *First National Bank of Plymouth v. Price*, 33 Md. 487. Therefore the statute must receive a strict construction. *Tiffany v. National Bank of Missouri*, 18 Wall. 410. Congress cannot constitutionally give to State courts jurisdiction over cases of penalties inflicted solely by the laws of the United States. *Jackson v. Rose*, Gen. Court of Va., 9 Niles' Reg., sup., 173; 2 Va. Cas. 84; *Commonwealth v. Feely*, 1 id. 321; *United States v. Campbell*, TAPPEN, J., in Ohio, 10 Niles' Reg. 405; Tappan, 291; *State v. Rudder (Almeida's case)*, Baltimore County Court, 12 Niles' Reg. 115, 231; *United States v. Lathrop*, 17 Johns. 4; *Teall v. Felton*, 1 Comst. 537 (affirmed, 12 How. 234); *Ely v. Peck*, 7 Conn. 239; *Davison v. Champlin*, id. 244; *State v. Tuller*, 34 id. 280; *Haney v. Sharp*, 1 Dana, 442; *Ward v. Jenkins*, 10 Metc. 587; *Martin v. Hunter's Less.*, 1 Wheat. 237; *Gelston v. Hoyt*, 3 id. 312, 328, 334; *State v. McBride*, Rice (S. C.), 400; *Prigg v. Pennsylvania*, 16 Pet. 617, 618, 664; *Sim's case*, 7 Cush. 302, 303, 308; *Moore v. People of Illinois*, 14 How. 20, 22; 3 Story on Const., § 1750; 1 Kent's Com. 403-404; *Miss. Tel. Co. v. First National Bank*, 74 Penn. St. 217; Chicago Leg. News, 158; 1 Kent's Com. 403; 3 Story's Com. on Constitution, § 1750.

AGNEW, C. J. The question before us is, whether a State court has jurisdiction in "an *action for debt*" (in the language of the National Bank Act) "to *recover back* twice the amount of the interest thus paid, from the association taking or receiving the same;" that is to say, when illegal interest is taken contrary to its provisions. The 30th section of the act of Congress of June 3, 1864, allows National banks to charge and take interest at the rate allowed by laws of the State where they are located, and no

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more, and then proceeds: "And the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back in an action of debt twice the amount of the interest thus paid from the association taking or receiving the same."

Bearing in mind the words of the act, that a right of action, in debt, is given to the debtor and those who represent him only, and not to the government or the public, let us see what reason would prevent the action from being brought in a State court, to recover back money paid to the extent of twice the interest paid. The question is most important to the people who are citizens alike under both State and National governments, for if they are driven into the Federal courts, the evil will be a monstrous one. The National banks are intended to do the business of the country in the midst of the people, just as others lending money and discounting paper do, whose places they have filled everywhere. They can sue and be sued in the State courts on all business done by them, secure themselves, and purchase under State laws for the sale of property, and enjoy the advantages of State laws as fully as our own citizens. Therefore, unless the Federal jurisdiction is *exclusive*, it is clear that even in a doubtful case our decision should be favorable to our own jurisdiction, leaving the doubt to be solved by the Federal judiciary; for if our judgment be against it, the citizen has no appeal to the Federal courts. If, however, the Federal jurisdiction be clearly exclusive, it is our duty so to declare, for the laws of the United States are our laws, and are "the supreme laws of the land, and the judges in every State shall be bound thereby." The relations of the States and the United States are so clearly defined in two recent decisions, none others need be cited: *Farmers and Mechanics' Bank v. Dearing*, 1 Otto, 29; *Thomp. N. B. Cas.* 117; *Claflin v. Houseman*, 3 Otto, 130. Justice SWAYNE says in the former, "that this law is as much a part of the law of each State, and as binding

upon its authority and people as its own Constitution and laws." In the latter, Justice BRADLEY, quoting Alexander Hamilton, says: "When in addition to this we consider the State governments, and the National government, as they truly are, in the light of kindred systems, and as parts of one whole, the inference seems to be conclusive that the State courts would have concurrent jurisdiction in all cases arising under the laws of the Union where it was not expressly prohibited." The learned justice then shows that the Judiciary Act of September 24th, 1789, was framed in this view, giving exclusive jurisdiction to the Federal courts in certain cases of National import, and concurrent in certain others of doubtful. A large mass of subjects was thereby left, which necessarily fell into the hands of the State courts having jurisdiction over similar subjects. Thus the rights and wrongs of individuals growing out of the laws of Congress were left to be enforced and redressed concurrently. This line of *civil* remedies for *individuals* is one clearly marked; but the courts of the United States have gone even beyond it. Thus in *Houston v. Moore*, 5 Wheat. 1, a Pennsylvania case, it was held that the State court had jurisdiction to enforce an act of Congress upon a delinquent under the act for the Organization and Training of the Militia; "not" (says Justice BRADLEY) "but that these courts might exercise jurisdiction in cases authorized by the laws of the State and not prohibited by the exclusive jurisdiction of the Federal courts." So in a suit in a State court against a postmaster for neglect of duty to deliver a newspaper under the postal laws of the United States, the jurisdiction was affirmed. *Teal v. Felton*, 12 How. 292. And indeed the legislation of Congress for the removal of causes from the State court into the Federal is founded on the admitted jurisdiction of the former.

We may now refer to some of our own decisions and laws. Thus it was held that our courts had jurisdiction of a forgery of a power of attorney to obtain a pension under an act of Congress. *Commonwealth v. Schaffer*, 4 Dall. 27. In *White v. Commonwealth*, 4 Binn. 418, this court decided that the passing a counterfeit note of the Bank of the United States was indictable under the act of 22d April, 1794, specially including the notes

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of that bank. *Buckwalter v. U. S.*, 11 S. & R. 193, was the case of a penalty under an act of Congress, sued for in the name of the United States. Justice DUNCAN said: "On the matter of jurisdiction, it is sufficient to observe this court has often sustained actions on penal acts of Congress, where the penalty is recoverable in the State courts, and though convenience is no justification for the usurpation of power, yet as the court does not see how this conflicts with the Constitution of the United States, the inconvenience may be considered, and it would be an intolerable inconvenience and grievance in an action for a penalty to drag a man from the most remote corner of the State to the seat of the Federal judiciary." The remark of Justice STRONG, in *Huber v. Reily*, 3 P. F. Smith, 118, was not intended to overrule *Buckwalter's* case, but to distinguish it, as shown by his own language, that the latter was an action for penalties *declared to be recoverable as other debts*, while he was treating of the disfranchisement of a deserter and the necessity of conviction by a court-marshal before the disability could be enforced. The case of *Houston v. Moore* has been already cited, where a penalty was inflicted under an act of Congress by a State court-marshal. The legislation of our State has run in the same direction. In 1829 Judge KING, Thomas I. Wharton and Judge SHALEER reported the penal act of that year. The act of 23d April, 1829, provided for forging and uttering any gold or silver coin then or thereafter passing or in circulation in this State, and for forging, counterfeiting or uttering a counterfeit note of the Bank of the United States. In 1860, the same great criminal lawyer, Judge KING, with Judge KNOX and another, was upon a commission to codify the criminal law, and reported the new sections of the act of 31st March, 1860, from 156 to 163, inclusive, punishing offenses relating to the coin, and in the report referred to the laws of the United States and the case of *Fox v. Ohio*, 5 How. 410, deciding upon an elaborate argument, that the clauses of the Constitution of the United States relating to the power to coin money and regulate its value do not prevent the State from enacting a law to punish the offense of passing counterfeit coin of the United States. These laws have remained unquestioned; yet I do not assert that none of

the provisions applied to the coin of the United States can be questioned. In view of *Fox v. Ohio* and other cases, there may be a doubt whether the provisions against making and debasing these coins can be sustained as to the question of jurisdiction. This, however, does not touch the present inquiry, which concerns only the *civil* jurisdiction of the State courts. In our sister States the power to maintain an action in the name and behalf of the United States for a penalty has been denied. *U. S. v. Lathrop*, 17 Johns. 4, a case relied on by the defendant in error, may be taken as an example; but Justice BRADLEY, in *Clafin v. Houseman*, *supra*, comments on this case, and remarks that the State courts having declined the jurisdiction does not militate against the weight of the argument, referring, with apparent approbation, to the dissenting opinion of Justice PLATT. The result of the discussion, in the language of the learned justice, is to affirm the jurisdiction when it is not excluded by express provision or by incompatibility in its exercise arising from the nature of the particular case.

The question of jurisdiction may be resolved now by an examination of the precise nature of the case before us. We have seen that there are two provisions in the thirtieth section of the law. By the first, the taking, receiving or charging a rate of interest greater than is allowed, "shall be held and adjudged a forfeiture of the entire interest." It will be noticed that the word *forfeiture* is used, yet the uniform practice has treated this not as pure penalty, but as a defense which may be set up to the recovery of interest. *Lucas v. Govt. Nat. Bank*, 28 P. F. Smith, 231; s. c., 21 Am. Rep. 17; *Thomp. N. B. Cas.*, 872; *Overholt v. Nat. Bank of Mt. Pleasant*, 1 Norris, 490; *Thomp. N. B. Cas.* 883. The word *forfeiture* is viewed simply as conferring a *right* which may be asserted by the defendant.

The second clause on which this case rests is, where "a greater rate of interest *has been paid*, the person paying the same, or his *legal representatives*, may *recover back*, in an action of *debt*, twice the amount of the interest *thus paid*, from the association *taking or receiving* the same." Here we find no declaration of a forfeiture as such, but a provision to recover back money paid in an action of debt. This vests a right in the borrower of reclamation

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in a common-law form of action, to be brought by himself and in his own right. It is not a penalty to be adjudged to the United States, or vested in the public, for which any citizen may sue. The form of action is within the jurisdiction of the State court, and the right claimed in this form is private, belonging to the borrower alone. It is therefore immaterial whether the source of the right is a State or Federal law. In either case it is a law binding on the State, which has given birth to the right. On this point the language of the court in *Clafin v. Houseman* has marked pertinency. "Every citizen of a State is a subject of two distinct sovereignties having concurrent jurisdiction in the State — concurrent as to place and person, though distinct as to the subject-matter. Legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its Constitution in the exercise of such jurisdiction." Again, the opinion says there is "no reason why the State courts should not be open for the prosecution of rights growing out of the laws of the United States, to which their jurisdiction is competent and not denied." Whatever doubts, therefore, have been expressed by some State courts as to penalties to be sued for by the United States, or some one in their behalf, in order to vindicate the Federal law, they do not extend to the case before us of a private right sued for by the citizen for himself. The debtor having paid his debt with usury, may "recover back" twice the amount of the interest paid, in a State court. It is in this sense, it was said in *Farmers & Mechanics' Nat. Bank v. Dearing*, 1 Otto, 35, Thomp. N. B. Cas. 117, that the thirtieth section of the law is remedial, and to be liberally construed to effect the object Congress had in view in enacting it. This view has been taken by the Maryland Court of Appeals in *Ordway v. Cent. Nat. Bank of Baltimore*, 47 Md. 217; s. c., 28 Am. Rep. 455; Thomp. N. B. Cas. 559. The able opinion of Judge ALVY discusses the subject very fully.

Judgment reversed and a venire facias de novo awarded.

FIRST NATIONAL BANK OF ALLENTOWN V. REX.

(89 Penn. St. 308.)

National bank — liability for special deposits.

A National bank, receiving a special deposit for safe-keeping without reward, is liable only for gross negligence; the burden of proof is on the plaintiff; and gross negligence is not the omission of that care which every attentive and diligent person takes of his own goods, but the omission of that care which the most inattentive takes.

It seems, when the president of a bank, for his own private purposes, hypothecates bonds especially deposited with the bank for gratuitous safe-keeping, and they are thereby lost, the bank is not liable, unless the bank officers knew, and assented, or used no effort to recover them.

ACTION against a National bank to recover the value of bonds deposited with it for gratuitous safe-keeping, in accordance with its custom, and hypothecated by the president for his own private purposes, and then lost. The opinion states other facts. The plaintiff had judgment below.

Edward Harvey and R. E. Wright, Jr., for plaintiff in error. The taking of special deposits for the accommodation of the depositor is not within the authorized powers of a National bank. *Wiley v. First National Bank*, 47 Vt. 546; s. c., 19 Am. Rep. 122; *First National Bank of Charlotte v. National Exchange Bank*, 2 Otto, 122; Whart. on Neg., § 470.

John Rupp, for defendant in error.

GORDON, J. The learned judge of the court below was accurately correct when he instructed the jury that the defendant, in a case like that under consideration, was held only for gross negligence, and that it rested upon the plaintiff to show affirmatively that the bank was guilty of such negligence. He errs, however, when he comes to define what the term "gross negligence" means. He says, "In a case like the one before us, where slight care is required to be exercised on the part of the bailee, the defendant is liable only in case of gross negligence. Negligence is

defined to be the absence of care, or the omission by a party to exercise that diligence which a prudent man ordinarily exercises in regard to his own property. Has the defendant in this case been guilty of that degree of negligence, viz., gross negligence?"

Had this definition been omitted it might have been presumed that the jury, from the use of the terms "slight care" and "gross negligence," would have reached a proper conclusion as to their meaning and effect, but in such case the presumption would be that the idea of ordinary care and ordinary prudence had been excluded, but this would necessarily exclude the learned judge's definition.

The fact is, the rule thus laid down by the court is the one which our brother WOODWARD, in the case of *Bank v. Graham*, 29 P. F. Smith, 106, Thomp. N. B. Cas. 875, adduces as decisive of the bailee's good faith and performance of his whole duty. In other words, as is said by DUNCAN, Justice, in *Tompkins v. Saltmarsh*, 14 S. & R. 275, "the bailee without reward is not bound to ordinary diligence, is not responsible for that care which every attentive and diligent person takes of his own goods, but only for that care which the most inattentive take."

It follows that if the defendant committed only a breach of ordinary care and diligence, in the keeping of the plaintiff's bonds, the verdict should have been in its favor.

Conceding that the bank, in case of gross negligence, would be liable for the loss charged, and we do not stop to discuss this question, as it has been definitely settled in the case of *The Bank v. Graham*, above cited,* then what remains is the inquiry whether the defendant was grossly negligent in the care of the property committed to its charge.

On this branch of the case the court charged that the mere fact that Blumer, the president, had used the bonds to raise money for his own private purposes, would not of itself make the bank liable, but if this improper use by him of the plaintiff's property was known to the bank officers, and they assented thereto, or if they had knowledge thereof, and made no effort to recover this

* See also S. C., *ante*, 64, and *Pattison v. Syracuse Nat. Bk.*, *ante*, 319.

First National Bank of Allentown v. Hoch.

property if it were recoverable, that would be such negligence on their part as would render the bank liable.

This is good, sound law, but we fail to discover the evidence which adapts it to this case. If there was any evidence showing knowledge on part of any of the bank officers but Blumer and his son, of or concerning these bonds or their use, proper or improper, it does not appear in the records submitted to us. [For this and another error,]

Judgment reversed and new venire awarded.

FIRST NATIONAL BANK OF ALLENTOWN V. HOCH.

(90 Penn. St. 324.)

National bank — power to act as broker in purchase of securities.

A National bank has no inherent power to act as an agent in the purchase of bonds or stocks for third persons, and its president cannot bind it by an agreement so to act, without special authority.

ACTION on a certificate of deposit. The opinion states the case. The plaintiff had judgment below.

Edward Harvey and R. E. Wright, Jr., for plaintiff in error.

William P. Snyder and John Rupp, for defendant in error. This paper is not merely a contract to buy bonds of the city of Allentown, but it is a certificate that Mr. Hoch has deposited in the First National Bank of Allentown \$1,000, which, with interest, is to be accounted for on demand. The bank could have discharged it at any time it saw fit, by paying or tendering the money to Mr. Hoch, and he might have gone to the bank at any time during banking hours and demanded the money.

Hoch paid the money to an officer of the bank, and if he was in default, and did not make the proper entries in the books of the bank, Hoch is not to be prejudiced thereby. The money having gone into the bank, through its proper officer, it is bound to repay it on demand, in accordance with the terms of deposit.

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MERCUR, J. The plaintiff in error is a National bank. The suit was against the bank, on a receipt signed by the president thereof, in the following words, to wit:

\$1,000.

ALLENTOWN, Dec. 18, 1875.

Received of Mr. William Hoch, one thousand dollars, to be invested in bonds of the city of Allentown, bearing seven per cent interest. Interest on the said deposit to be allowed from this date and to be accounted for on demand.

W. H. BLUMER,

President First Nat. Bank.

The defendant in error failing to obtain all the required bonds, or a return of the residue of the money, brought this suit.

The court directed the jury to return a verdict in his favor.

It is well-recognized law that a National bank is not, by its charter, authorized to act as a broker or agent in the purchase of bonds and stocks. Its specified powers given by statute, nor its incidental powers necessary to carry on the business of banking, do not extend to the transaction of such business. *First Nat. Bank of Charlotte v. Exchange Bank*, 2 Otto, 122; Thomp. N. B. Cas. 124; *Fowler v. Scully*, 22 P. F. Smith, 462; s. c., 13 Am. Rep. 699; Thomp. N. B. Cas. 854. When the paper on its face shows the transaction not to be within the usual course of business of the bank, it is not binding on the bank, although signed by the president thereof, as such officer. He is the executive agent of the board of directors within the ordinary business of the bank, but cannot bind it by a contract outside thereof, without special authority. I do not understand these general rules to be denied. Some of them are expressly admitted, and the others impliedly conceded by the court below, and by the counsel for the defendant in error. The court ruled the case on the construction it gave to the receipt. The learned judge said to the jury, "the question as to whether the plaintiff is or is not entitled to recover in this action depends upon the construction that is put upon the receipt of December 18, 1875, which has been offered in evidence. It is the duty of the court to construe this paper. If this were an obligation on the part of the bank to purchase and furnish the plaintiff with the kind of security mentioned in the paper, it would be beyond the power of the bank or its president

to enter into that obligation, and the plaintiff would not be entitled to recover. But I construe this paper to mean that it is an acknowledgment that the plaintiff did pay to the president of the defendant \$1,000, which was treated, according to the terms of the paper, as a deposit, and might be discharged by the bank, either by furnishing the bonds of the city of Allentown, or by repaying the money with interest."

It was undoubtedly the duty of the court to construe the paper; but we cannot concur in the construction given. The principal object of the contract, clearly shown by the receipt, was the purchase of bonds. That was the specific purpose for which the money was left and received. The language of the receipt assumed that the desired bonds could not be procured, and to prevent a loss of interest in the meantime, to the defendant in error, the latter clause was added. The primary thought and main intent of the contract was a purchase of bonds. The secondary one was to procure interest until the investment could be made.

While the word "deposit" does appear in the receipt, yet it is evidently used as a synonym for money or fund. The receipt does not state that the money is left as in the case of an ordinary deposit; nor that it shall be deposited in bank to his credit; nor was it ever so deposited. It was put in the hands of the city treasurer on the very day of its receipt, presumably for the purpose of getting the city bonds. The bank never received the money. It was never subject to the check drawn by the defendant in error on the bank. Although the transaction was with Blumer, as president of the bank, yet in all legal aspects, it was with him as an individual. Upon the uncontradicted testimony, the defendant in error was not entitled to recover.

Judgment reversed.

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THIRD NATIONAL BANK OF PHILADELPHIA v. MILLER.

(7 Weekly Notes of Cases, 496.)

Usury—forfeiture of interest—note held as collateral for overdrafts.

A National bank, by charging usurious interest on overdrafts upon it, loses the right to any interest.

Where a note is held by a National bank as collateral for overdrafts upon it, and a suit is brought upon the note, the action, though nominally upon the note, is actually to recover those overdrafts as against the makers of the note as sureties. Such sureties are entitled, in case usurious interest has been charged, to defalcate all the interest charged as against the total amount of overdraft claimed.

The fact that the bank from whom an overdraft was due charged its customers usurious interest in the same transactions in which it agreed to pay usurious interest to the plaintiff, does not preclude a defense of usury by sureties for an overdraft.

(Supreme Court of Pennsylvania.)

ERROR to the Common Pleas of Cumberland county.

Debt on the following promissory note:

\$20,000.

SHIPPENSBURG, PENNA., Nov. 22, 1872.

One day after date, we jointly and severally promise to pay to the order of J. Hiram Hubley, cashier, twenty thousand dollars, without defalcation, value received. This note to be held as collateral by Third National Bank of Philadelphia for the payment of any overdrafts by the Farmers and Mechanics' Bank of Shippensburg, Penn.

Signed,

A. G. MILLER, President.

JAMES B. ORR,

J. M. MEANS,

T. P. BLAIR,

H. G. SKILES,

HENRY SNYDER,

JOHN A. AHL.

The Farmers and Mechanics' Bank of Shippensburg, Penn., about 1868, opened an account with the Third National Bank of Philadelphia. Each bank kept debit and credit sides of the account. The Farmers and Mechanics' Bank was in the habit of sending to the Third National Bank, and the Third National

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Bank to the Farmers and Mechanics' Bank, notes for collection, checks and drafts on other banks, currency, and other cash items, all of which were respectively charged and credited in the accounts kept by each bank with the other. The Third National Bank was also in the habit of discounting for the Farmers and Mechanics' Bank notes taken by the latter, the latter charging the parties for whom they had them discounted the amount of discount charged thereon by the Third National Bank. The Farmers and Mechanics' Bank also issued drafts on the Third National Bank, which were credited and charged in the several accounts.

At the end of every month, the Third National Bank sent to the Farmers and Mechanics' Bank an account current as kept by it during the past month. The latter, after examining the account and comparing it with its own, would report that it agreed with its books, and what the balance was. With this balance the account for the ensuing month would open, and so on from month to month. The last report made was in March, 1875, for the month of February, 1875, shortly after which the Farmers and Mechanics' Bank failed.

About September, 1873, the Farmers and Mechanics' Bank began to become indebted to the Third National Bank, and in November, the overdraft became so heavy, that in order to secure the same and its continuance, the note in question was given. The note was duly indorsed by J. Hiram Hubley, cashier, and delivered to the Third National Bank. This action was brought to recover the amount of the overdraft, viz., \$12,403.27. On the average daily balance due by the Farmers and Mechanics' Bank for each month interest would be charged and entered on the account. The interest thus charged and included in the overdraft amounted in all to \$7,893.30, and was in excess of the legal rate. It was admitted that of this amount, \$1,324.15 had been recouped by defendants in a former suit against the makers of a note given to secure the overdraft, due on account of a certain series of notes discounted by the Third National Bank for the Farmers and Mechanics' Bank.

On the trial, plaintiff requested the court to charge the jury:

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That the act of Congress providing that excess of interest, if demanded by a National bank, "shall be deemed a forfeiture of the entire interest which the note or bill . . . carries with it, or which has been agreed to be paid thereon," destroys the interest-bearing quality of the note only while it is running, but that from the date of its maturity, interest is chargeable. *Refused.*

That no excess of interest had been charged on the very note in suit, and that therefore there had been no forfeiture of interest. *Refused.*

That at the end of each month, the accounts between the two banks became settled, and that therefore the amount of usurious interest charged had been paid in law; and that therefore the only remedy is an action under the act of Congress for the penalty incurred by taking usurious interest. *Refused.*

That as far as the transactions in discounting notes were concerned, the Farmers and Mechanics' Bank paid no illegal discount, nor had agreed to do so, but was a mere agent for the party from whom it took the notes. *Refused.*

The court instructed the jury, that under the act of Congress (Revised Statutes U. S., § 5198), the charging of usurious interest by a National bank destroyed the interest-bearing character of the debt; and that they must deduct \$1,324.15, the amount of interest already recouped, from \$7,893.30, the aggregate amount of interest; and that the balance of \$6,569.15 must be deducted from the total amount sued for, viz., \$12,403.27.

He instructed them, therefore, to find for the plaintiff for the amount of \$5,834.12.

Verdict and judgment for plaintiff accordingly.

The plaintiff took this writ, assigning for error the refusal of the court below to affirm the plaintiff's points.

J. H. Graham (with him *Duncan M. Graham* and *John Hays*), for plaintiff in error.

W. Trickett (with him *J. M. Weakley*, *F. E. Beltzhoover*, *W. F. Sadler* and *Lemuel Todd*), contra.

THE COURT. We have examined with care the several errors assigned in this case. It is unnecessary to discuss them separately. A statement of the principle upon which the cause turned will show, we think, that no error was committed by the learned court in their rulings and charge to the jury. Though the action was nominally on a promissory note given by the defendants, yet, as it was expressed on its face that it was to be held as collateral by the plaintiffs for the payment of any overdrafts by the Farmers and Mechanics' Bank of Shippensburg, it was actually a suit to recover those overdrafts, against the defendants as sureties. It cannot be disputed that the defendants would be entitled to the benefit of whatever defense would be available to the Farmers and Mechanics' Bank. The plaintiffs, being a National bank, by charging more than six per cent interest on these overdrafts, lost the right to recover any interest at all. The point, then, does the act of Congress forfeit interest beyond the maturity of the note sued on, does not arise. No recovery was had on the note; it was evidence merely of the obligation of the defendants to meet and answer the liability of the Farmers and Mechanics' Bank on the overdrafts. Admitting that the monthly accounts were stated accounts, that certainly never has been held to preclude a defendant from setting up an illegal charge of usury. Nor can the fact that the Farmers and Mechanics' Bank charged illegal interest to their customers on the notes discounted for them by the plaintiffs, affect their right to set up, as against the plaintiffs, their violation of the act of Congress under which alone they have any right to do business at all.

Judgment affirmed.

Per CURIAM. PAXSON, WOODWARD and STERRETT, JJ., absent.

GRUBER V. FIRST NATIONAL BANK OF CLARION.

(8 Weekly Notes of Cases, 113 *)

Usury—jurisdiction of State courts to recover—private charters, how far court will take judicial notice of.

State courts have jurisdiction in an action against a National bank to recover double the amount of usurious interest paid thereto.

A bank is a private corporation, and its charter a private act, to be pleaded and proven as all other private acts. The court cannot take judicial cognizance of the fact that there are State banks whose charters authorize them to take more than six per cent interest.

The general rate of interest allowed in Pennsylvania to be taken by State banks is only six per cent. The establishment of a few banks authorized by special acts of assembly to take more than this amount is not sufficient to authorize National banks to take usurious interest under that clause of the National Bank Act allowing them to charge interest at the same rate as banks of issue organized under the laws of the State wherein the National bank is situate.

CROSS writs. Error to the Common Pleas of Clarion county. Debt, by John Gruber, Sr., against the First National Bank of Clarion, Pa., to recover, under the provisions of the National Bank Act, double the amount of certain payments of usurious interest made to the bank within two years prior to the beginning of the action; and also the excess above legal interest on certain other payments of usurious interest made more than two years previous to the commencement of the action, and within six years of same.

The declaration contained ten counts for double the amount of usurious interest paid within two years next before suit; also the common count for money had and received, money paid, and an account stated, the latter being intended to cover excess of legal interest paid more than two and less than six years before bringing suit.

Defendant pleaded "*nul debet*," and also a second and third plea to the jurisdiction. Plaintiff joined issue upon the first

* Also reported, 38 Am. Rep. 378; 87 Penn. St. 468.

plea and demurred to the second and third. After argument, the court below sustained the demurrer, and entered judgment "*quod respondeat ouster*." The case then went to trial upon the general issue.

On the the trial, before JENKS, P. J., the following facts appeared: "The bank defendant at various times, beginning on March 29, 1870, had discounted for plaintiff certain notes, some being notes of plaintiff himself; some of plaintiff and Henry Gruber; some of plaintiff, Henry Gruber and Samuel Newell; some of Cook & Co. and plaintiff; all of which, however, were shown to have been discounted only for the benefit of the plaintiff, the other makers acting only as his sureties. Upon these transactions, illegal discount at the rate of twelve per cent per annum was charged by the defendant. Sometimes the discount was paid at the purchase of the notes, sometimes it was reserved out of the amount given for the notes, and sometimes it was added into the notes, and went along the line of successive renewals until paid. A number of the notes so discounted were subsequently reduced to judgment, and paid out of the proceeds of real estate belonging to plaintiff, sold under judicial process.

Plaintiff requested the court to charge that the plaintiff is entitled to recover from defendant double the amount of all interest or discount paid by plaintiff within two years previous to the inception of this action, when such interest and discount were in excess of six per cent, the legal rate of interest in the State. *Refused.* Plaintiff's first assignment of error.

The defendant requested the court to charge:

1. That the action to recover by the plaintiff from the defendant twice the amount of the interest paid, under section 5198 of the Revised Statutes of the United States, is an action to recover a penalty. Answer. The action, so far as it is used to recover double the amount of the interest, is an action to recover penalty, and in so far as it is sought to be thus used, cannot be maintained.

2. That Congress has no power to confer on the State courts jurisdiction to recover such penalty, and as to such penalty this action will not lie. *Affirmed.*

3. That the claim of the plaintiff for penalty under an act of

Congress, and for the recovery of excess of interest, are incongruous, and there can be no recovery for both of said demands in this action. *Affirmed.* Plaintiff's second, third and fourth assignments of error.

The plaintiff requested the court to charge: Plaintiff is entitled to recover the excess above the legal rate of interest allowed by the State on all sums paid by him as interest or discount within six years of the time suit was brought, up to within two years of the inception of the same. Answer. The plaintiff is entitled to recover the excess above the legal rate of interest allowed by the State on all sums paid by him and received by the defendant as interest or discount within six years of the time suit was brought, when the sum has not been included in judgment entered against him, or against himself and others. Defendant's first assignment of error.

Defendant requested the court to charge: That as the several counts for penalties under the act of Congress lay the payment of the excessive interest to have been made on an indebtedness of John Gruber only, there can be no recovery of penalties as to any excess which may have been paid on note of John and Henry Gruber, or notes of Gruber and Newell. Answer. There can be no recovery of the penalty, but for all interest or discount in excess of six per cent not included in judgments entered against the plaintiff and others, paid by him in negotiating for his own benefit, either his own or the paper of others made for his benefit, there can be a recovery, the same having been paid within six years previous to the commencement of this suit. Defendant's second assignment of error.

Plaintiff offered in evidence the notes upon which usurious interest had been charged, to all of which, except those made by plaintiff alone, defendant objected. Objection overruled and evidence admitted. Exception. Defendant's seventh, eighth, ninth and tenth assignments of error.

Verdict and judgment for plaintiff in the sum of \$1,049.97.

W. L. Corbett, for plaintiff.

Wilson & Jenks, for defendant.

The following was the opinion of the court upon the plaintiff's writ of error :

SHARSWOOD, J. The first three assignments of error must be sustained. The answers of the learned court below to the first point of the plaintiff, and to the first and second points of the defendants, are based upon the ground that the State courts have no jurisdiction of an action to recover double the amount of usurious interest against a National bank under the thirtieth section of the act of Congress of June 3, 1864, entitled "An act to provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." The contrary has been recently held by the court in *Bletz v. Columbia National Bank* (*ante*, p. 366).

The answer to the third point of the defendants we also think erroneous — that the claim of the plaintiff to recover the penalty under the act of Congress, and the claim to recover the excess of interest, are incongruous, and there can be no recovery for both these demands in the same action. What the plaintiff claimed was the penalties on payments made within two years of the commencement of the suit, and the excess paid before that time, within the statute of limitations. We see nothing incongruous in these two claims. Besides, the misjoinder of counts in a declaration ought properly to be taken advantage of by demurrer, in arrest of judgment, or on error. The assignment ought to have been of error in the judgment on account of such misjoinder. But there was no misjoinder. It is a mistake to suppose that the last count in the declaration — not three counts, but one count combining three money demands — is in assumpsit. It is in debt, as are the other counts. No doubt if the first ten counts had been in a *qui tam* action, the judgment would have been different from that on the other counts, and therefore it would have been a misjoinder. Bacon's Abr., Action *qui tam* E. But in debt for a statute penalty given wholly to the party aggrieved, the judgment is *quod recuperet*.

Judgment reversed, and *venire facias de novo* awarded.

WOODWARD, J., absent.

The following was the opinion of the court upon defendant's writ of error:

SHARSWOOD, J. As the judgment in this case has been just reversed on the writ of error sued out by the plaintiff below, and a *venire facias de novo* awarded, it will be unnecessary to consider in detail the fifteen errors assigned on this record. It is quite sufficient to say, that under the decision of this court in *Lucas v. Government National Bank*, 28 P. F. Smith, 228; Thomp. N. B. Cas. 872; 21 Am. Rep. 171, we find no error in the answers of the learned court below, of which this plaintiff has any cause to complain. The objections to evidence which were overruled were on the ground of variance to counts in the declaration upon which, in the end, the court did not enter judgment. There is technically an error in the judgment, according to the view of the learned court below. The counsel on both sides assumed that the last count in the declaration was three counts, from its including in one demand — debt for money had and received — money paid, laid out and expended, and money found due on an account stated. The entry of judgment on the last three counts was in fact an entry of judgment on the ninth, tenth, and last count — the ninth and tenth being for the penalty. The judgment is wrong, and must be reversed, although, if the case had not to go back for another trial, this error might be corrected in this court.

What the learned counsel for the plaintiff in error principally insisted upon in his oral argument, as ground for a reversal without a *venire de novo*, was a point which does not appear to have been made below, and which does not arise on this record. It is contended that, under the act of Congress establishing the National banks, those institutions have a right to charge and receive whatever amount of interest any banks of issue, chartered by the State, have a right to receive; and that several banks of issue were incorporated and in existence during the period that the alleged usury was paid in this case, who might lawfully make any contract with their debtors on the subject of interest. In the Circuit Court of the United States for the Western District of Pennsylvania, the point was so ruled by Mr. Justice STRONG and

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Judge McKENNAN, reversing a judgment in the District Court. *First National Bank of Mount Pleasant v. Duncan*, 6 Weekly Notes, 158; Thomp. N. B. Cas. 360. The ruling in that case was on the rejection by the District Court of an offer to show that there were State banks of issue authorized by special charters to charge and receive more than six per cent. We give no opinion upon this question. No offer was made in the court below to give such evidence. It is contended now that the court will take judicial notice of the fact. No doubt, in New York and other States the court will take judicial notice of institutions organized under a general banking law. Although the General Banking Law of April 16, 1850 (Pamph. L. 477), is undoubtedly a public act, and when the charter of any particular bank is produced and proved, the court will take judicial notice of its provisions, yet without such proof it cannot take notice of the charter. A bank is a private corporation — its charter a private act — to be pleaded and proved as all other private acts. It has been held by the District Court of Philadelphia, in *Handy v. Philadelphia and Reading Railroad Co.*, 1 Phila. 31, that an act, which declares that loans and contracts previously made by any person with a particular corporation shall not be deemed usurious by reason of the corporation agreeing to pay more than legal interest, is a private act.

Judgment reversed, and *venire facias de novo* awarded.


WOODWARD, J., absent.

Concurring opinion by AGNEW, C. J. The 5197th section of the Revised Statutes of the United States, providing for the rate of interest to be charged by the National banks, is in these words, viz.: "Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State, territory, or district where the bank is located, and no more; except that where, by the laws of any State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by

the laws of the State or territory or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run." The rest of the section is not material. The intent of Congress not to interfere with the general rates of interest established by each State is manifest in the first clause of this section, and is strengthened by the next section (5198), forfeiting the entire interest in case a greater rate is charged. This was a duty the government owed to the States, in order to impair as little as possible the established policy of the State in which its people are educated. If the State have no established policy, and has fixed no general rate of interest, the third clause provides for a rate not exceeding seven per cent. But a contingency might arise where a rate differing from the general rate might be established by the State for its own banks of issue. This therefore was made the subject of the exception in the second clause. Banks of issue having the power to issue circulating notes would compete with the National associations, and their rate of interest was to be allowed to the latter, if it exceeded the general rate established by law. But what State banks are banks of issue is plainly a State question, to be decided by the laws and tribunals of the State, and to be followed by the Federal judiciary.

If, according to the State decision, a particular State bank, or a class of banks, have not the power to issue circulating notes, the issue would be illegal, and the charter of the bank might be forfeited. On the other hand, if the State bank, or the class, have the power to issue circulating notes by State decision, the jurisdiction of the Federal law over the rate of interest attaches, and National banks will be allowed the same rate. These principles it seems to me are plain, and determine when the decisions of the State courts must govern.

It is our province, therefore, to declare whether the banks of this State, termed savings and deposit banks, are banks of issue; or in other words, have the power to issue circulating notes. That they are not is, I think, very clear. They are, with very few exceptions, of modern date, and have never in practice been recog-



nized as having this power ; besides, all the charters I have examined, and I think I omitted none since the passage of the General Bank Act of 1850, have an express provision against the power to issue bank or circulating notes.

If we examine the legislation of this State on the subject, it will be found that only those known as "banks" or "banking institutions," in the language of the laws, are banks of issue ; and they are governed by a complete system existing since 1814. This system began in the act vetoed by Governor Snyder, and repassed on the 21st of March, 1814. This law was followed by the act of 25th of March, 1824, rechartering the banks then existing, many having failed, chartered by the act of 1814. Between the date of the act of 1824 and the passage of the General Bank Act of 16th April, 1850, many special charters were passed, but in all the banks were subjected to the provisions of the acts of 1814 and 1824, mostly in express words, and in some by subjecting them to all the laws relating to banks. The act of 1824 was almost a transcript of the act of 1814, with some amendments suggested by experience. When we reach the act of 1850, we find it to be almost a repetition of the acts of 1814 and 1824. Many of its sections are nearly exact transcripts.

All the banks since chartered by special acts are expressly subjected to the provisions of this act. This history, as well as the terms of the act of 1850, proves conclusively that the first section of the act of 1850 is intended to apply to banks such as are provided for in the acts of 1814, 1824 and 1850, viz., to banks of issue only. That section is in these words : "That every banking corporation hereafter created by any special act of the general assembly, and every bank hereafter rechartered, or the charter of which shall be hereafter extended or renewed by any such act of assembly, shall be subject to the provisions of this act." The very language of the section, as well as the subsequent provisions to which it refers, makes it evident that it was intended to apply only to banks or banking institutions having the power to issue circulating notes as money. These provisions, and many others in the fundamental articles, are wholly inapplicable to savings and deposit banks.

I am therefore clearly of opinion that the General Bank Act of 1850 does not embrace savings and deposit banks. It is highly important that the State judiciary should preserve the manifest distinction made by the legislature between banks of issue and savings and deposit institutions, not merely as bearing on the question of the rate of interest of the National banks, but because of its important bearing on the policy and internal economy of the State in regulating her institutions. I venture to say no one familiar with the legislation of the State has ever thought the act of 1850 applied to these minor institutions, until pecuniary astuteness developed the idea.

But a more conclusive argument is found in the legislation itself relating to savings and deposit banks. I have examined many charters, and all have a provision forbidding the bank to issue its own bills in the manner of bank notes for circulation as money, and subjecting them to the penalties of the bank acts for so doing. And this is not all. A general act was passed November 6, 1856 (P. L. 1857, p. 797), extending the 30th section of the General Bank Act of 1850 to "all incorporated banking, savings fund, trust and insurance companies," with the proviso "that nothing herein contained should authorize any savings bank, trust or other company to create any bank note or certificate in the similitude of a bank note."

But we have been referred to the charter of the Franklin Bank of Philadelphia, act of April 1, 1870 (P. L. 736). Whether there are others similar I do not know, having seen no other; but this is a special act, and anomalous certainly as to the provision for interest. It is evidently one of those special laws run through by influence, and without a consideration of consequences, and certainly out of harmony with all our legislation as to banks. It has but four stockholders named in the charter, and it allows the bank to lend money and discount paper "at such rates of interest as may be agreed upon by the parties," and again, "at such rates of interest as may be agreed upon by said bank and the borrowers." This is the only special charter of this kind we have been referred to, and if it be held to be a means of overturning the settled policy of the State as to the rate of interest to be charged

by individuals and by banks of issue, it will be a wrong resulting from a shameful piece of legislation, understood by neither the people nor the legislature itself. No court, State or Federal, would allow it to be the means of introducing covertly such consequences. When properly understood I do not think it will lead to them.

But before discussing this point it is proper to refer to the case of the *First National Bank of Mount Pleasant v. Duncan*, 6 Weekly Notes, 158; Thomp. N. B. Cas. 360, before Justice STRONG of the Supreme Court of the United States, and Judge McKENNAN, Circuit judge. That case was decided not upon an actual state of fact, but upon offers of evidence refused by the District Court. The offer was to prove that *many* banks of issue had been organized under the laws of the State with power to charge such amount of interest as should be agreed upon between the bank and the borrower or customer. Of course the offer was to be taken as true, so that the decision rested not on an actual state of fact, but on one supposed *pro hac vice*. In the case before us we have no such assumed state of fact, but the simple question whether the charter of a single bank, or even of a few others, if any there be, with power to *agree* upon a rate of interest with the borrower, is such an alteration of the General Bank Law regulating banks of issue, and of the general law of the State regulating interest, as will bring the case within the National Bank Act, and allow all National banks to agree with their customers upon, and charge a rate of interest beyond the general rate of the State allowed to individuals and to banks of issue. While I admit this to be a question for the Federal judiciary, I think it will be long before its highest court will decide that so partial and anomalous a law as the Franklin charter, will be sufficient to set aside the entire current of State legislation, and overturn its most cherished policy as to banks of issue, evidenced by all its legislation since the year 1813. I think there are good reasons for this conclusion. In the first clause of section 5197, Congress has expressed its great and ruling intent not to interfere with State policy and legislation as to its adopted rate of interest. The second clause is but

an *exception*, and is declared in the most definite language, and therefore is not to be carried beyond its expressly declared words, so as to conflict with the main general intent. The language is, "except that where by the *laws* of any State a different *rate* is *limited* for *banks of issue* organized under State laws, the *rate* so *limited* shall be allowed for associations organized or existing in any such State under this title." I have italicized the leading words of the exception to bring out its full meaning. Thus the language, "where by the *laws* a different *rate* is *limited* for *banks of issue*," certainly is general and not particular. It does not mean, that where a particular person or a particular bank is given a privilege, this privilege shall govern, but where the laws allow banks of issue as a class a different rate. So the rate of interest is a *limited rate*. Clearly this cannot be said of that which is unlimited — which is no rate at all, but is a specific sum agreed upon by two parties. The very fact that both the bank and the borrower must agree upon a sum takes from the charge the character of a *limited rate*. So far from its being a limited rate, it is not fixed at all, it has no limits but in the will of the parties. Clearly it is not a "rate," but a *power* conferred to agree upon a compensation to be determined by themselves. The State has conferred this power on certain citizens, but where has Congress conferred upon the National banks such a power to *agree* upon a rate with the customer? On the contrary, the act of Congress confers no such power to *agree*, but expressly enacts that its creature can take only such *rate*, or standard, as the State law fixes as the *rate*, or standard for her own *banks of issue*. To my mind it is perfectly clear that no such power to *agree* upon a rate or particular compensation is conferred by Congress on the National banks. When the State allows her own banks of issue as a class the privilege of taking a higher rate of interest than is allowed by the general law, that rate may be adopted by the National banks.

There are some of the remarks of the learned justice who gave the opinion in *Duncan's* case, which must have been written from mere impressions without examination. For example, that until recently, in Pennsylvania, State banks were always organ-

ized under special laws, applicable solely to each bank ; that no rate of interest was limited for banks as a class, etc. The reverse is true. The act of 1814 divided the State into twenty-seven districts, and provided for the number of banks in each district, giving to each its name, and incorporating all upon one system, subject to the same general terms and provisions, and fundamental articles, and provided for all the same rate of interest, viz., one-half of one per cent for every thirty days (*vide* 12th fundamental article). It was at that time, probably, the most complete and perfect system for bank charters in the United States. These charters embraced all the then known banking institutions in the State, excepting one or two in Philadelphia, which had been chartered before the year 1800, and limited them to the 1st of April, 1825. This limit brought into existence the act of 1824, which was a general law repeating substantially the provisions of the act of 1814, and its purpose was to re-charter the banks incorporated in 1814 which then remained, many having failed in the interval of great depression which followed the close of the war. The enumeration of banks in the first section will be found to contain many of the yet leading banks of this State. I have examined all the acts of incorporation from 1824 to 1850, and find all are incorporated by reference to the acts of 1814 and 1824, either in express terms or in general terms, which constitute these acts the fundamental provisions of their charters. The same rule has prevailed as to special acts since 1850. There are many special acts, but it is entirely inaccurate to say they were applicable solely to each bank. On the contrary, all inhere in the same system, and are subject to the same rate of interest, made a fundamental article in the system.

It will be seen, therefore, that from this inaccuracy of recollection much of the learned justice's argument is without force. In another particular it seems to me the opinion is not convincing, when it is asserted that to allow a State bank to take a greater rate of interest is injurious to the National bank system. While uniformity in this respect is desirable, it seems to me the fact that National banks charge a less rate is not injurious to them ; certainly the tendency of the lesser rate is to draw the customers of

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banks to them, and not to send them away. If there be any thing in competition it is to draw custom to the lower charges. True, a higher rate will make more money when such rate is paid, but the question is upon the effect of the rate on the National bank system; and certainly if all the National banks in the State are limited to six per cent, the effect will be either to draw custom from the State banks charging a higher rate of interest, or to compel them to lower their rates to a common standard. On the other hand, if it be argued that the National banks should be allowed to make as much as the State banks of issue, it may be conceded, and that this is the precise intent of the act of Congress. But Congress did not intend to place them on a vantage ground over the State banks. To say that all the National banks in a State can adopt an *exceptional* rate allowed to a single bank in a State, or even two or three, is to place them above the State banks as a class, and contrary to the main intent of the 5197th section. Clearly Congress did not intend to injure the State banks as a class. It is hard enough to be almost taxed out of existence, purposely, as conceded by Justice STRONG in *Tiffany v. National Bank*, 18 Wall. 413; Thomp. N. B. Cas. 90. Taxing out of existence was the very argument used by Chief Justice MARSHALL against the State power of taxation of Federal institutions, in *McCulloch v. State of Maryland*, 4 Wheat. 316. Neither is a fair exercise of the power. It is not a question of comparative merits between the State and National banks, or of usury or non-usury laws. These are not judicial questions. State judges are bound by her laws, and United States judges should have no desire to interpret Federal laws unjustly. The true question is, what did Congress intend in the 5197th section, and its predecessor, the act of 1864. Fair dealing requires that no advantage should be given to either State or National banks as a class. This section adopted the State rate of interest as the *law*, and made the *exception* depend on the rate of interest allowed by the State to her own banks of issue.

So, also, we should in our own consistency. The rate of interest for banks was fixed by the act of 1850. The public, the

not suspected any other rate

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to prevail, or other banks to banks of issue to exist. We decide upon the true character of our own State institutions whose powers cannot be extended by the decisions of other courts. I think the judgment should be affirmed on this question. It was the principal question discussed in the argument, and was considered in consultation; but the opinion of the court being now on other grounds in which I concur, this opinion will be filed as a concurring opinion.

FIRST NATIONAL BANK OF CLARION V. GRUBER.

(8 Weekly Notes of Cases, 119.*)

Usury — State banks of issue — jurisdiction of State courts over suits for penalties.

In no way, either by set-off or original action, can interest over the legal rate paid to a National bank be recovered, except by way of penalty, within two years, as prescribed by the National Bank Act.

State courts have jurisdiction of suits to recover such penalty.

There are no State banks of issue in Pennsylvania authorized to charge interest at a greater rate than six per cent. A National bank cannot, therefore, claim such privilege.

ERROR to the Common Pleas of Clarion county. Debt, by John Gruber, Sr., against the First National Bank of Clarion. The former proceedings in this case, and the material facts thereof, are set forth in the report of the preceding case of *Gruber v. The First National Bank of Clarion*. After the record had been remitted to the Common Pleas, defendant, by leave of the court, filed a special plea setting forth the charters of incorporation of eighteen banks doing business in the State of Pennsylvania, all of which defendant averred were banks of issue, and authorized to take and receive interest at a higher rate than six per cent per annum, wherefore defendant alleged that the First National Bank of Clarion was in like manner under the provisions of the 5197th section of the Revised Statutes of the United

* Also reported 87 Penn. St. 465.

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States authorized to receive interest at a higher rate than six per cent. Verdict and judgment for plaintiff in the sum of \$1,661.01.

Geo. A. Jenks (*Wilson* with him), for plaintiff in error.

Wm. L. Corbett, for defendant in error.

GORDON, J. The evidence in this case establishes the fact that John Gruber was the beneficial owner of the notes produced on the trial, and that for him alone were they discounted by the bank. It hence follows that any claim that Henry Gruber might have set up to the penalty growing out of the illegal discounts, was without foundation, and was properly disregarded.

In like manner, the learned judge of the court below properly ruled that the banks created by the several acts of assembly given in evidence by the defendant were not banks of issue. These acts specifically define the powers of the several corporations created by them, but among them is not found the power to issue circulating notes, commonly known as bank notes. But the rule is, that as corporations are purely statutory creatures, powers not specifically granted are to be taken as withheld, and cannot be raised by implication, unless they are ancillary to and necessary for the proper exercise of those granted. The defendant then having failed to show that the banks referred to were banks of issue, it cannot under the act of Congress claim the right of those banks to take more than six per cent interest on loans and discounts.

All other points put to the court below were well answered, except the defendant's tenth point, and others involving the same principle. That point reads as follows: "There can be no recovery, under the evidence, as to moneys claimed in this action except as to the penalty." The answer was: "We think there can be recovery for such moneys as were paid by the plaintiff as interest or discount, where such moneys so paid were in excess of six per cent." By a recent decision of the Supreme Court of the United States this would seem to be error, but it is an error of this court rather than of the court below, for our decisions in

Lucas v. Bank, 28 Sm. 232 ; s. c., 21 Am. Rep. 17 ; Thomp. N. B. Cas. 872, and kindred cases, were followed.

The case to which we refer is *Barnett v. National Bank*, 8 Otto, 555 (*ante*, p. 18), a case very much like the one under consideration. The defense, *inter alia*, was that Barnett and Whitesides, the drawees and acceptees of the bill in suit, were borrowers from the bank as early as January 11, 1866 ; that the indebtedness was continuous and unbroken from the 8th of April of that year ; that it was at no time less than \$4,000, and at one period amounted to \$36,000 ; that at the time of the assignment of the drawees to Barnett & Craig, who intervened and were made parties, the indebtedness was \$28,000 on bills of exchange ; that the bank had taken not less than \$5,000 in excess of the legal rate of interest ; that for evasion the bills were arranged in series, and that each series was terminated, from time to time, by refusing to renew and discounting a new bill, the proceeds of which were applied in payment of the prior terminating one ; that the bank had received satisfaction of all the bills but the one in suit, and that there was nothing due from the defendants. On demurrer this plea was overruled by the court below, and this ruling was affirmed by the Supreme Court. Mr. Justice SWAYNE, delivering the opinion of the court, in commenting upon the statute, says : " Two categories are thus defined and the consequences denounced. (1) Where illegal interest has been knowingly stipulated for, but not paid ; there only the sums lent without interest can be recovered. (2) Where such illegal interest has been paid, then twice the amount so paid can be recovered in a penal action of debt, or suit in the nature of such action against the offending bank, brought by the persons paying the same, or their legal representatives ;" and further on in the same opinion : " In the first defense the payment of the usurious interest is distinctly averred, and it is sought to apply it by way of off-set, or payment, to the bill of exchange in suit. In our analysis of the statute we have seen that this could not be done."

From this it appears certain that neither by set-off nor original action can interest, over legal rate, paid to a National bank, be recovered, except by way of penalty, as prescribed by the act of Congress of June 3, 1864.

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We have but to add that the case of *Bletz v. Columbia National Bank*, ante, p. 366, rules that the courts of this State have jurisdiction of suits to recover twice the amount of illegal interest under the provisions of the National statute above referred to.

The judgment is reversed, and a new venire awarded.

Opinion by GORDON, J.

STEPHENS V. MONONGAHELA NATIONAL BANK.

(88 Penn. St. 187 ; 33 Am. Rep. 436.)

Ultra vires — usurious interest — renewal note.

Forfeiture of the privileges and powers of a National bank must be determined, by a suit brought by the Comptroller of the Currency and until determined, it may do business; and no person, by a conspiracy to evade its regulations, may escape liability for borrowed money loaned by it, upon personal security in the manner authorized.

In an action by a National bank against the maker of a note for accommodation, evidence was offered to prove a violation by the bank of section 5200 of the Revised Statutes of the United States, which declares "the total liabilities to any association of any persons or any company, corporation or firm, for money borrowed, including in the liabilities those of the several members thereof, shall at no time exceed one-tenth of the amount of the capital stock of such association actually paid in;" and that the loans in pursuance of it were in excess of the authority and power of the bank. The evidence being rejected, *held* no error.

Where there has been a series of renewals for the same loan, in a suit by the bank upon the last note, the borrower is entitled to a credit for all the interest paid on the loan from the beginning and not merely the excess above the lawful rate.

ACTION on a promissory note made by and indorsed by Barzilla Stephens for the accommodation of Israel Stephens. The plaintiff had judgment on the following special verdict:

That the defendant gave a note to the plaintiff, dated October 10, 1874, calling for \$10,575, payable twenty-five days after date. That \$75 was charged as the interest on \$10,500, from its date to maturity of said note and put in the note. That for excessive interest over six per cent on all the transactions that Israel Stephens

had with the plaintiff from April 7, 1870, there was charged to him the sum of \$1,907.04, and that the note in suit was a renewal of a note given by Israel Stephens in his life-time to said plaintiff, and that the balance due the plaintiff at this date, less all the interest from the date of the note in suit, and the amount of excessive interest as aforesaid, was the sum of \$8,592.96.

The court rejected the following offers of evidence:

That the plaintiff has recovered judgment against Richard S. Long, one of the real debtors, issued execution, levied on a large amount of personal property, stayed the execution and released the personal property of said Long. That defendant notified plaintiff to proceed and collect this judgment, as he would not stand bound as surety any longer.

That since said notice, the said R. S. Long has had a large amount of personal property which could have been sold on execution on said judgment. That the plaintiff has refused to collect the judgment of the real debtor, although said Long had sufficient real and personal property to satisfy said judgment. This after sufficient notice from defendant to so proceed.

That the note in suit is one of several notes discounted by plaintiff for Israel Stephens and R. S. Long, who were partners in buying and selling cattle and other stock in the west. That the note in suit and the other notes just referred to were discounted under an agreement entered into by and between the plaintiff bank and Israel Stephens, that as the plaintiff could not loan the said firm of Israel Stephens and R. S. Long, without violating the law of Congress, only one-tenth of the capital stock of plaintiff bank being paid in, nor the individual members of said firm, said plaintiff bank would discount the notes for said Israel Stephens and Richard S. Long, to evade the provisions of the 29th section of the National Currency Act of 3d of June, 1864 (being section 5200 of the Revised Statutes of the United States), and that the said loans and notes were in excess of the authority and power of said plaintiff to make.

The court refused to charge that if the jury believed that at the time the original of the note in suit and each renewal thereof was taken, the bank knowingly reserved and charged interest and

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discount thereon in excess of the amount permitted by the National Bank Act to National banks located and doing business in this State, then each of said notes was without consideration to the extent of the sums so reserved and charged as interest and discount.

That if the jury believed that the plaintiff knowingly violated any prohibition contained in the National Bank Act at the time it took the note in suit, and the prior notes of which it was the last renewal, then no action can be here maintained upon such contract made in violation of an United States statute.

That the plaintiff being a National bank organized and doing business under an act of Congress, known as the National Bank Act, this court is without jurisdiction over this case.

A. A. Purman and P. A. Knox, for plaintiff in error. The loans were in excess of one-tenth, and plaintiff cannot recover. *Bank of the U. S. v. Owens*, 2 Pet. 538; *Dill v. Ellicott*, Taney's Cir. Ct. Dec. 233; *Maybin v. Coulon*, 4 Dall. 298; *Seidenbender v. Charles' Adm'r*, 4 S. & R. 151; *Holt v. Green*, 23 P. F. Smith, 198; s. c., 13 Am. Rep. 737; *Morris Run Coal Co. v. Barclay Coal Co.*, 18 P. F. Smith, 174; s. c., 8 Am. Rep. 159; *Bowman v. Cecil Bank*, 3 Grant, 36; *Mechanics' Savings & Loan Co. v. Conover*, 5 Phil. 18, and other cases referred to in *Fowler v. Scully*, 22 P. F. Smith, 466, 467; s. c., 13 Am. Rep. 699; *Thomp. N. B. Cas.* 854.

The amounts being recovered in violation of law cannot be retained, and neither time nor contract will sanctify them or legalize the defendant's possession as against the rightful owner. *Brown v. Bank*, 22 P. F. Smith, 212; *Thomp. N. B. Cas.* 849; *Lucas v. National Bank*, 28 P. F. Smith, 232; s. c., 21 Am. Rep. 17; *Thomp. N. B. Cas.* 872.

Sayers & Sayers, for defendant in error.

TRUNKY, J. [Omitting an immaterial point.] It was earnestly pressed that the court erred in rejecting the offer to prove an agreement between the bank and Israel Stephens, to violate section 5200 of the Revised Statutes U. S., which

declares that "the total liabilities to any association of any person, or of any company, corporation or firm for money borrowed, including, in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in;" and that the loans, in pursuance of said agreement, were in excess of the authority and power of the bank to make. No principle is better settled than that an action cannot be maintained on a contract, the consideration of which is either wicked in itself or prohibited by law. This has been often discussed, and recently in an able opinion by the present chief justice, in *Fowler v. Scully*, 22 P. F. Smith, 456; s. c., 13 Am. Rep. 699; Thomp. N. B. Cas. 854, a case relied on in support of the offered testimony. Not stopping to remark upon the rule, nor upon distinctions between cases within and without, we come to consideration of the statute, to ascertain if the alleged agreement prevents recovery of the money loaned.

The powers conferred on banks must be distinguished from regulations for their business. An act done without authority, and forbidden, is not like one which violates a regulation. In *Fowler v. Scully* the action was upon a mortgage, showing on its face that it was taken to secure loans to be made, and "to avoid the necessity of procuring the additional indorsement to said paper of a third party." It was held that, 1. Under section 5736 banks have power to loan money on personal security, but not upon other; 2. Section 5137 authorizes them to take mortgages to secure debts previously contracted; 3. They are prohibited, by necessary implication, from lending money on the security of a mortgage. The reasoning in support of these conclusions seems unanswerable, yet so close was that case to the border beyond which a contract will not be held void for illegal consideration, that two-fifths of the judges believed it on the other side and dissented from the judgment. Here the note was in the power of the bank to take, and the security was personal. Nothing on the face of the note, nor in the plaintiffs' evidence, shows a taint of illegality. It appears as clear as any transaction within the conceded powers of the bank. The statute has many provisions for regulation of banking business. Some sec-

Stephens v. Monongahela National Bank.

tions, as 5197 and 5198, relating to interest, contain clauses of forfeiture and penalty for violation. But everywhere it has been held that the bank may recover the money actually loaned upon a usurious contract. Other sections, as 5201 and 5208, for violation, subject the bank to appointment of a receiver. Nearly all the sections, including 5200, relating to liabilities of any one person to the bank, are vindicated by the provisions in section 5239, which declares that a willful violation of any provision shall forfeit the rights, privileges and franchises of the association. Such violation can only be determined by suit brought by the Comptroller of the Currency in the proper court of the United States. And in case of such violation, every director who participated in or assented thereto shall be personally liable for all damages, in consequence of the violation, sustained by the bank, its shareholders or any other person. Until the forfeiture be determined, in the mode provided, the bank may do business; and no person, by a conspiracy to evade its regulations, may escape liability for borrowed money, loaned by the bank, upon personal security in the manner authorized. In *O'Hare v. Second National Bank of Titusville*, 27 P. F. Smith, 96; Thomp. N. B. Cas. 869, it was said, per AGNEW, C. J.: "Evidently the limitation of the indebtedness to the one-tenth in the 29th section (5200, R. S.), was intended as a general rule for conducting the business of the bank; a rule laid down from experience to regulate its loans for its own best interest, and those of stockholders and creditors, not a rule to regulate its customers. It was, as remarked in *Fowler v. Scully*, a regulation to prevent these associations from splitting on the rock which has ruined so many banks, to wit, that of lending too much of their capital to one person or firm. The intention being to protect the association and its stockholders and creditors from unwise banking, we cannot suppose it was meant to injure them by forbidden recovery of the injudicious loans. We should not interpret the section so as to carry its prohibition beyond its true purpose, and thus cause it to destroy the very interest it intended to protect by regulation. To do so would be, as said by the court below, to demand a penalty in favor of one individual for an offense against the country, and invite to dishonesty under a pretense of a regard for the law." If

this language was not strictly necessary to disposition of that case it is apposite here, and demonstrates that a contract purposely made in evasion of that section is not void. Of course, we have considered the offer as true, namely, that there was a conspiracy between the bank and the borrower to violate the statutory regulation. The question is whether the note is invalid on general principles of policy, and not one of equity and justice between the parties. The public good is the ground of relief to a defendant who proclaims his own turpitude in the willful violation of a statute, and his shame in refusing payment of what he justly owes — not his worthiness. The bank is treated as a conspirator, but the fact is unmistakable that it was its officer. It is not the intentment of the statute to provide a way by which an unfaithful officer and dishonest stranger may empty the vaults of the bank, work its ruin, to the great loss of its shareholders and creditors, and the receiver of its money, wrapped in the mantle of public policy, escape liability.

Error is assigned to the rulings of the court limiting set-off of excess of interest, paid on other transactions, to a period within six years preceding the trial. While it may be true, that neither time nor contract will sanctify or legalize the taking and holding of usurious interest by a National bank, it is just as certain that the remedy for the owner to recover it back is by a personal action. The right of action accrues the very instant the usury is paid. That it is barred in six years by the act of 27th March, 1713, is too plain for remark. It is difficult to imagine a case where the statute does not begin to run from payment of the usurious money, for the owner almost necessarily has knowledge of the facts from the first. In case of fraud the statute runs from its discovery. Not a tittle was shown to toll the statute, at law or in equity.

The rulings of the learned judge upon the question of jurisdiction need no vindication. They accord with the doctrine in *Bletz v. Columbia National Bank*, 6 Norris, 87; s. c., 30 Am. Rep. 343 (*ante*, p. 366).

But one other point requires special notice. Since this cause was tried in the court below, it has been decided that where there has been a series of renewal notes given to a National bank, for

Commonwealth ex rel. Torrey v. Ketner.

the continuation of the same original loan, and the bank sues to recover its debt on the last, the borrower is entitled to credit for all the interest he has paid from the beginning, on the loan, and not merely to the excess above the lawful rate. All interest paid, or charged and put into the notes, must be credited. *Overholt v. National Bank of Mt. Pleasant*, 1 Norris, 490; Thomp. N. B. Cas. 833; *Cake v. Bank*, 5 Norris, 303; Thomp. N. B. Cas. 890. Nothing can be added to the opinion of SHARSWOOD, J., in *Overholt v. Bank*. The rulings upon offers of testimony, answers to points, and charge, so far as inconsistent with the principles of that case, are erroneous. And for this, judgment is reversed, and a *venire facias de novo* awarded.

Judgment reversed.

COMMONWEALTH EX REL. TORREY V. KETNER.

(37 Legal Intelligencer, 339.)

Jurisdiction of State court—embezzlement.

A State court has no jurisdiction to try a cashier of a National bank for embezzling its funds.*

(Pennsylvania Supreme Court.)

HABEAS CORPUS.

William Torrey, the prisoner and relator, was charged with embezzling, abstracting and misapplying the funds, moneys and assets of the First National Bank of Ashland, in Schuylkill county; a bank duly incorporated, organized and established under the laws of the United States, commonly known as the National Banking Act.

The prosecution, which was commenced before a justice of the peace, was returned to the Quarter Sessions of Schuylkill county, and in that court a true bill was found, and the indictment and record show upon the face of the proceedings that the offense charged was for embezzling, abstracting and misapplying the

* See *U. S. v. Conant*, ante, 148.

funds of the First National Bank of Ashland, created under the National Banking Act.

Torrey was arrested and lodged in the county prison, then took out this writ of *habeas corpus*, and in obedience to its command, Ketner, the warden of the Schuylkill county prison, produced the body, and made return that he held the prisoner by virtue of above-named proceedings.

By virtue of article V, § 3 of the Constitution of 1874, the Supreme Court of Pennsylvania, in cases of *habeas corpus*, have original jurisdiction.

William A. Marr, James Ryon, William B. Mann and John W. Ryon, counsel for relators, contended: 1st. That the court below had not jurisdiction, for embezzlement was never a criminal offense at common law. 2 Russ. on Crimes, 163; 4 Bl. Com. 230; *United States v. Clew*, 4 Wash. 700. Congress has power to give the Federal courts exclusive jurisdiction. *Houston v. Moore*, 5 Wheat. 1-24; 1 Kent Com. 398; Curtis Com. 176; *Clafin v. Houseman*, 3 Otto, 141. Where an act of Congress creating a corporation provides a punishment to be inflicted upon any officer of the corporation who embezzles its property, it is not competent for the State legislature to make the same act an offense against the laws of the State. *Commonwealth v. Fuller*, 8 Met. 313; *Commonwealth v. Pelton*, 101 Mass. 204; *Commonwealth v. Barry*, 116 id. 1; *State v. Tuller*, 34 Conn. 280. By section 711 of the Judiciary Act of 1789 (U. S. Rev. Stat. 134), the jurisdiction vested in the United States courts is exclusive of the State courts. Section 5209, *et seq.*, of the National Banking Act provides for punishing embezzlement by officers. 2d. That the acts of assembly of the Pennsylvania legislature did not cover this case, admitting that the legislature had power to pass such an act; that sections 116, 117, 118 and 119 of the Crimes Act of 1860 (P. L. 411; Purdon's Dig. 348, §§ 169, 170, 171 and 172), were repealed by the act of June 12, 1878 (P. L. 196), and as that changed the penalty and the period of the Statute of Limitations after the alleged crime was committed, the relator could not be sentenced under it. That the act of May 1, 1861

(P. L. 515 ; Purdon's Dig. 124, § 41), only applied to State banks. The National banks were not in existence then.

A. W. Schalck, district-attorney, and Hughes & Farquhar, counsel for respondent, contended that the State court had jurisdiction, as the charge against the relator was not for violation of any provision of any act of Congress, but is simply a charge of embezzlement by an officer of a bank in violation of the laws of this Commonwealth. Jurisdiction of State courts has been sustained in *Buckwalter v. United States*, 11 S. & R. 196; *White v. Commonwealth*, 4 Binn. 418; *Commonwealth v. Shaeffer*, 4 Dall. 27; *United States v. Hutchinson*, 4 Clark, 211; *Jett v. Commonwealth of Virginia*, 7 Am. Law Reg. (N. S.) 265; *Claflin v. Houseman*, 3 Otto, 130; *Coleman v. State of Tennessee*, 7 id. 509, especially the dissenting opinion of CLIFFORD, J., not differing in this respect from the majority of the court.

PAXON, J. It appears by the return to this writ that the relator is held to answer an indictment in the Court of Quarter Sessions of Schuylkill county, charging him, as cashier of the First National Bank of Ashland, with having embezzled the funds and property of said bank. There are three counts in the indictment, each varying the form of the charge, but not essentially changing its substance.

It is almost needless to say that a *habeas corpus* is not a writ of error. Hence if the court below had jurisdiction of the offense, we cannot correct its rulings in this proceeding, however erroneous they may be. On the other hand, it is equally clear that if the relator is being prosecuted for a matter which is not an indictable offense by the law of Pennsylvania, or one over which the court below has no jurisdiction, it would be our right, as well as our plain duty, to discharge him. No authority is needed for so obvious a proposition.

Embezzlement by the cashier of a bank is not a common-law offense. This indictment must rest upon some statute of this State, or it cannot be sustained. Has it such support? As preliminary to this question, it is proper to say that section 5209 of the United States Statutes provides specifically for the punish-

ment of cashiers and other officers of National banks who shall be guilty of embezzling the moneys, funds or credits of such institutions. The relator was not indicted under this section, and could not have been, in a State court. Our own legislation upon this subject may be briefly stated. We have first the Crimes Act of 1860 (P. L. 382), the 116th section of which prescribes and punishes the offense of embezzlement by any person, "being an officer, director, or member of any bank, or other body corporate or public company." Then we have the act of May 1, 1861 (P. L. 515), entitled "A supplement to an act to establish a system of free banking in Pennsylvania, and to secure the public against loss from insolvent banks, approved 31st of March, 1860," which also prescribes and punishes embezzlement by bank officers. Lastly, there is the act of 12th of June, 1878 (P. L. 196), which amends the aforesaid 116th section of the act of 1860, by substituting a new section in its place, and imposing a different punishment. This leaves the acts of 1861 and 1878 as the only ones which could possibly support the indictment. It was urged, however, and with much force, that the act of 1861 was only intended to apply to banks organized under the free banking law, of which it forms a part; and that as to the act of 1878 the offense charged in the indictment was committed prior to its passage. This fact was formally conceded upon the argument, and while we might not be able for such reason to grant relief upon *habeas corpus*, it furnishes a conclusive reason, why, upon a trial in the court below, the Commonwealth could derive no aid from the act of 1878.

We are spared further comment upon these acts for the reason that they have no application to National banks. Neither of them refers to National banks in terms, and we must presume that when the legislature used the words "any bank" that it referred to banks created under and by virtue of the laws of Pennsylvania. The National banks are the creatures of another sovereignty. They were created and are now regulated by the acts of Congress. When our acts of 1860 and 1861 were passed there were no National banks, nor even a law to authorize their creation. When the act of 1878 was passed, Congress had already

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defined and punished the offense of embezzlement by the officers of such banks. There was therefore no reason why the State, even if it had the power, should legislate upon the subject. Such legislation could only produce uncertainty and confusion, as well as a conflict of jurisdiction. In addition, there would be the possible danger of subjecting an offender to double punishment, an enormity which no court would permit if it had the power to prevent it.

An act of assembly, prescribing the manner in which the business of *all* banks shall be conducted, or limiting the number of directors thereof, could not by implication be extended to National banks, for the reason that the affairs of such banks are exclusively under the control of Congress. Much less can we, by mere implication, extend penal statutes, like those of 1861 and 1878, to such institutions.

The offense for which the relator is held is not indictable either at common law or under the statutes of Pennsylvania. We therefore order him to be discharged.

LUBERG V. COMMONWEALTH.

(87 Legal Intelligencer, 339.)

Jurisdiction of State court — fraudulent entries.

A teller of a National bank may be tried by a State court for fraudulently making false entries in the bank books, with intent to defraud the bank.

(Pennsylvania Supreme Court.)

CHARLES C. LUBERG was convicted in the court below under two bills of indictment.

The first charged him, as receiving teller of the First National Bank of Mahanoy City, with receiving the moneys, etc., therein named, and unlawfully, maliciously, willfully and fraudulently embezzling, abstracting and misapplying the same, with intent to injure and defraud, in the first count, the bank, and in the second count, the individual stockholders.

The second was as follows:

In the Court of Quarter Sessions of the Peace for the county of Schuylkill, May Term, 1878.

COUNTY SCHUYLKILL, *ss.*:

The grand inquest of the Commonwealth of Pennsylvania, inquiring for the county of Schuylkill, upon their respective oaths and affirmations, do present, that Charles C. Luberg, late of the said county, yeoman, on the first day of May, in the year of our Lord one thousand eight hundred and seventy-eight, at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., was then and there the receiving teller of the First National Bank of Mahanoy City, in the county aforesaid, a bank duly incorporated, organized and established under the laws of the United States of America, and as such receiving teller of said bank, did then and there unlawfully, maliciously, willfully and fraudulently make false entries in the books, reports and statements of the said the First National Bank of Mahanoy City, with the intent thereby to injure and defraud the said the First National Bank of Mahanoy City, to the great damage of the said bank, contrary to the form of the act of the general assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

He was convicted September 20, 1878, and a motion for a new trial having been overruled, he was, on November 11, 1878, sentenced as follows:

On first indictment, to one year's imprisonment, etc.

On second indictment, to one year's imprisonment, to commence and take effect immediately after the expiration of the sentence imposed in the first.

The prisoner, therefore, has served his time under the sentence imposed upon him on the first indictment, so the prisoner is now serving out his sentence upon the second indictment.

The defendant filed the following assignments of error:

1. The Court of Quarter Sessions of Schuylkill county had no jurisdiction over the offense of embezzlement, abstracting and misapplying the funds and property of the First National Bank of

Mahanoy City, being a bank incorporated, organized and established under the laws of the United States.

2. The Court of Quarter Sessions of Schuylkill county had no jurisdiction over the offenses charged in said second indictment of making false entries in any book, report or statement of the said First National Bank of Mahanoy City, being a bank created, incorporated, organized and established under the laws of the United States.

James Byon, for plaintiff in error.

A. W. Schalek, district attorney, *Geo. R. Kaercher* and *Lin Bartholomew*, for defendant in error.

PAXSON, J. The second assignment denies the jurisdiction. The plaintiff in error was convicted upon an indictment charging him, as receiving teller of the First National Bank of Mahanoy City, with fraudulently making false entries in the books, reports, and statements of said bank, with intent to injure and defraud the said bank, and we are asked to reverse the judgment, upon the ground that the offense charged having been committed by an officer of a National bank, it is not the subject of an indictment in a State court. *Commonwealth ex rel. Torrey*, decided at the term (see preceding case), was relied on to sustain this position. Torrey was indicted as a cashier of a National bank with embezzling the funds of the bank, and was discharged upon *habeas corpus* for the reason that the offense was not indictable at common law, and our statutes defining and punishing the offense do not apply to National banks. Here the indictment charges an offense which was a crime at common law. In *Commonwealth v. Beamish*, 31 P. F. Smith, 339, it was decided that the fraudulent alteration of a book, known as a tax duplicate, was forgery at common law. It is plain, under this authority, that the plaintiff in error could have been indicted for forgery. The indictment here is laid under the statute, and does not charge the offense of forgery in the technical manner required by the strict rules of the common law, but, as in *Commonwealth v. Beamish*, is good under our Criminal Pro-

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cedure Act. That the act of assembly does not call it forgery makes no difference. It is the same offense.

The first assignment alleges error in another case, in which the plaintiff in error was convicted and sentenced. We cannot, upon this writ of error, reverse a judgment in another case, though against the same party. Nor is it material, as the record shows the plaintiff has served out the term of imprisonment imposed by the court.

Judgment affirmed.

FOLL'S APPEAL.

(*Albany Law Journal*, 27.)

Specific enforcement of contract for sale of National bank stock.

In an equitable action to enforce specific performance of an agreement to sell shares in a National bank, which the purchaser wished to obtain for the purpose of securing control of the bank, *held*, that specific performance would not be decreed, (1) because generally equity will not enforce specific execution of a contract relating to personal chattels, and (2) because a decree enforcing the agreement in question would be against public policy.

APPEAL from a decree of the Court of Common Pleas of Erie county, directing a specific performance of an agreement to sell National bank shares, in an action in equity by R. M. Greer against John W. Foll. Sufficient facts appear in the opinion.

C. B. Curtis and John P. Vincent, for appellant.

Davenport & Griffith, and Benson & Brainerd, for appellees.

PAXSON, J. This case presents some extraordinary features. We have nothing like it in this State since equity powers were conferred upon the courts. It was a bill to compel specific performance of a contract for the sale and delivery of fifteen shares of the stock of the First National Bank of North East, under the following circumstances: The bank in question is situated at North East, Erie county, Pennsylvania, and has a capital of \$50,000, di-

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vided into five hundred shares of \$100 each. R. M. Greer, complainant below and appellee, is a merchant in North East, and at the commencement of the year 1877, owned ten shares of the stock of the bank in question. His mother owned sixty-five shares, and his brother owned forty. About that time R. M. Greer conceived the idea of getting enough of the capital of the bank to control it, and to carry out this plan made an arrangement with his uncle, E. C. Custard, and E. E. Chambers, an operator in oil, to raise sufficient money to buy a controlling interest. They succeeded in buying a considerable amount of the stock, mostly on borrowed capital, but still lacked the few shares necessary for control. John W. Foll, the appellant, had the requisite number, and on March 7, 1877, Greer and Foll entered into the following contract :

"I hereby agree to purchase fifteen shares of the First National Bank of North East, from John W. Foll. The price to be paid is to be \$2,110.55, and interest from July 20th at ten per cent ; said stock to be delivered before the second Tuesday of January, 1878."

This contract was in writing, and signed by the parties. Before the time arrived for delivering the stock, Foll informed Greer that he would not deliver it. Foll then made a tender of the money specified in the contract. This bill was then filed and referred to a master, who made his report, recommending a decree for specific performance. Exceptions were filed to the report by Foll, which, after a hearing, were dismissed by the court below, the master's report was confirmed, and a decree entered commanding Foll to transfer to Greer the shares of stock referred to. From this decree, Foll entered an appeal to this court.

The avowed object of the purchase of the stock and the filing of this bill was to get the control of the bank for Greer and his friends. This appears upon the face of the bill, and is the main ground upon which equitable relief is asked. While the primary object was to obtain the control of the bank, there were at the same time secondary objects. As a part of the plan, the said R. M. Greer was to be made cashier, and Custard and Chambers, before mentioned, were to be directors.

The general rule is that equity will not enforce specific execution of a contract relating to personal chattels. 3 Pars. on Cont

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364. This is so even in England, where the equity jurisdiction is much broader than in this State. The reason for the rule is, that for the breach of a contract of sale of personal chattels, there is an adequate remedy at law. A jury can be in no doubt as to the proper measure of damages. This is especially true of stocks and public securities which have a known market value. The disappointed purchaser can go into the market and purchase a corresponding number of shares of the same stock.

To this general rule, however, there are exceptions. An article of personal property may have certain qualities not common to other articles of like description, or may have an especial value by reason of its antiquity, family association, or the like. A number of instances are collected in *McGowan v. Remington*, 2 Jones, at p. 61. They are title deeds of an estate and other muniments of property; an antique silver altar piece; *Duke of Somerset v. Cookson*, 3 P. & Wms. 389; an ancient horn, the symbol of tenure by which an estate is held; *Pusey v. Pusey*, 1 Ves. 273; heirlooms; 3 Ves. and B. 18; and even a finely carved cherry stone. *Ambler*, 77.

I know of no instance in this State in which a court of equity has decreed specific performance of a sale of stocks. *McGowan v. Remington*, *supra*, which was cited on behalf of the appellee, is not in point. The specific chattels in that case, whose return was sought to be enforced, consisted of a surveyor's maps, plans, and papers of like character. They manifestly came within the exceptions noted, and besides it was a clear case of trust. But we need not pursue this subject further, as the case in hand turns upon a different principle.

While the legal right of the complainant to buy up sufficient of the stock of this bank to control it in the interest of himself and friends may be conceded, it is by no means clear that a court of equity will lend its aid to help him. A National bank is a *quasi* public institution. While it is the property of its stockholders, and its profits inure to their benefit, it was nevertheless intended by the law creating it that it should be for the public accommodation. It furnishes a place supposed to be safe, in which the general public may deposit their moneys, and where they can obtain tem-

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porary loans upon giving the proper security. There are three classes of persons to be protected — the depositors, the noteholders and the stockholders. We have no intimation that the bank, as at present organized, is not prudently and carefully managed. The stock as now held is scattered among a variety of people, and held in greater or lesser amounts. It is difficult to see how the small stockholders, who have their modest earnings invested in it, the depositors who use it for the safe-keeping of their moneys, or the business public, who look to it for accommodation in the way of loans, are to be benefited by the concentration of a majority of its stock in the hands of one man, or in such way that one man and his friends shall control it. Especially is this so when an attempt is made to control it by the use of borrowed capital. The temptation to use it for personal ends in such cases is very strong. It is a fact to which we cannot close our eyes, that the financial wrecks of such institutions with which the pathway of the last few years is so thickly strewn are the result, in a great measure, of personal management. This purchase has not even the merit of being an investment on the part of the plaintiff. When a man buys and pays for stock with his own money it may be regarded as an investment. When he buys it upon credit, or pays for it with borrowed money, it is a mere speculation.

Were we to affirm this decree, I see no reason why we may not be called upon to use the extraordinary powers of a court of equity to assist in miscellaneous stock jobbing operations. A person who is attempting to make a "corner" in stock, or in any article of merchandise, who had made his contract with that end in view, might with equal propriety call upon us to decree specific performance thereof. But the decree of a chancellor is the exercise of a sound discretion ; it is of grace, not of right, and will never be made where the equity and justice of a case is not clear.

We are in no doubt as to our duty in the premises. We are of opinion that the end sought to be attained by this bill is against public policy, and for that reason we refuse our aid.

The decree is reversed and the bill dismissed, at the costs of the appellee.

COUNTY OF LANCASTER V. LANCASTER COUNTY NATIONAL BANK.

(7 Weekly Notes of Cases, 29.)

Taxation—bank building—when not liable to taxation for county purposes.

Where part of the capital of a National bank is invested in a building used for banking purposes, and the bank pays into the State tax prescribed upon the par value of all its shares, the building cannot be taxed for county purposes, although the cashier occupies a part of it as a residence (*See note, p. 418.*)

(Lancaster Common Pleas.)

ON January 20, 1879, the Lancaster County National Bank paid into the State treasury a tax of one per centum upon the par value of all the shares of said bank, having elected to collect the same from the shareholders of said bank, as provided in the act of assembly of March 31, 1870, § 4 (Purd. Dig. 143, 97). Part of its capital and profits was invested in its bank building, situated in the city of Lancaster, assessed for taxation at a valuation of \$16,000. The part of the building not required for the banking business was occupied by the cashier and his family.

J. Hay Brown, for plaintiff.

Wm. Aug. Atlee, for defendant.

THE COURT. The question presented by the facts is, whether or not said banking building should be assessed, and the bank be compelled to pay tax upon it?

The act of assembly of March 31, 1870, § 4, under and by virtue of which the Lancaster County National Bank paid into the State treasury a tax of one per centum upon the par value of all its shares, declares that: "In case any bank or savings institution, as aforesaid (section 3 having stated that 'all the shares of National banks, located within this State, and of banks and savings institutions incorporated by this State, shall be taxable,' etc.), shall elect to collect annually, from the shareholders thereof, a tax of one per centum upon the par value of all the shares of

County of Lancaster v. Lancaster County National Bank.

said bank or savings institution, and pay the same into the State treasury, on or before the 20th day of January in every year, the said shares, capital and profits shall be exempt from all other taxation under the laws of this Commonwealth; and the law regulating the compensation of county treasurers for receiving moneys for the use of the Commonwealth, and paying over the same, is hereby extended to the cashier of said banks and savings institutions."

This bank, as "The Lancaster County Bank," was, by its original charter, which has been revived from time to time, prior to the National Banking Act, authorized to "hold such lands, tenements and hereditaments as shall be requisite for its accommodation in the convenient transaction of its business."

It has been decided in Pennsylvania, that "a house erected as a toll-house by an incorporated canal company, and so built as to be occupied not merely as the collector's office, but as *his family residence*, is notwithstanding the fact of its being the residence of the collector, and a building of some pretensions, a constituent part of the canal, and cannot be assessed for taxation under the acts of 1834 and 1844. *Schuylkill Nav. Co. v. Commissioners of Berks County*, 1 Jones, 202; *Lehigh C. & N. Co. v. Northampton County*, 8 W. & S. 334. That the *works* of an incorporated *gas company* are not taxable as *real estate* for State and county purposes. *West Chester Gas Co. v. County of Chester*, 6 Cas. 232. That a *general* statutory provision, exempting corporate property from taxation, embraced only such property as was essential in the execution of its purposes, and did not cover property held by the corporation (outside of the house in which its business was transacted), as a mere convenience. *Lehigh C. & N. C. v. Northampton Co.*, 8 W. & S. 334; *Railroad v. Berks County*, 6 Barr, 70; *Carbon Iron Co. v. Carbon County*, 3 Wright, 251; *Lackawanna I. & C. Co. v. Luzerne County*, 6 id. 424; *Proprietors of Meeting-house in Lowell v. City of Lowell*, 1 Metc. 538.

In Iowa it has been held that the personal property and assets of National banks, such as safes, office furniture, etc., are not tax-

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able by the State. *Bank v. Young*, 25 Iowa, 311; Thomp. N. B. Cas. 451.

In New Jersey, that a general exemption of the property of the corporation but subjecting the stock in the hands of the stockholders to taxation, exempts the *surplus funds* and *lands* of the corporation. *State v. Tunis*, 3 Zab. 546.

In Georgia, that exemption of capital stock exempts property of the company necessary to carry on business. *Railroad Co. v. Mayor and Councils of Rome*, 14 Ga. 275.

In Kentucky, that where the charter of a bank exempts its property from all taxation, in consideration of the annual payment of a certain percentage on its capital, property of the bank cannot be taxed, either by the State or the county. *Farmers' Bank v. Commonwealth*, 6 Bush, 127.

In Maryland, that the stock of a banking corporation is the representative of its whole property, and when a tax has been laid on the stock in the hands of the shareholders, the real and personal estate of the corporation becomes exempt from taxation, as to tax both the real and personal property and the capital stock would amount to a double tax, which is illegal and unjust. *Gordon v. Mayor of Baltimore*, 5 Gill, 231; *McCulloch v. Maryland*, 4 Wheat. 316.

In Minnesota and New York, that the banking office and lot owned and occupied as its place of business by a National bank is not liable to assessment and taxation as *real estate* against the bank, under laws of a State which taxes the shares of such bank at their actual value, *without reduction for real estate*. *Commissioners of Rice County v. Citizens' National Bank*, 23 Minn. 280; Thomp. N. B. Cas. 629; id. 300, 326.

In Connecticut, see *Town of New Haven v. Bank of New Haven*, 31 Conn. 106.

And we think the same may fairly be deduced from the decision of our own Supreme Court, as it will be found reported in *Everitt's Appeal*, 21 P. F. Smith, 216.

The case stated, or special verdict, finds that this bank has, within the time prescribed by section 4 of the act of March 31 1870, paid into the State treasury a tax of one per centum upon

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the par value of *all its shares*; that *part* of its *capital* and profits are invested in its *bank building*. It has, therefore, as is shown by the case presented, paid a tax on the shares represented by its bank building — a building necessary to carry on its business, and in which its business is actually transacted.

A banking-house is one of the indispensable accessories, and is necessarily incident to the business of banking. It is true that the case stated shows the house to be one of some size and pretensions, larger than is absolutely necessary for mere banking rooms or office, and that the cashier, an officer of the bank, resides in that portion thereof which is not necessarily used for the purposes of banking. It does not appear that he pays any rent for the portion of the house he occupies.

Being of opinion that under the act of March 31, 1870, the decisions above cited, and the facts presented in the case stated, the banking-house of the Lancaster County National Bank, and the lot or piece of ground whereon the same is erected, is not subject to assessment and taxation for county purposes, we enter judgment for the defendant, with costs.

Opinion by LIVINGSTON, P. J.

NOTE BY THE REPORTER.—In *De Soto Bank v. City of Memphis*, 6 Baxt. 415; s. c., 32 Am. Rep. 530, it was held that under a statute exempting from taxation a lot of ground for the use of a private banking institution, the bank is not entitled to exemption of such parts of the banking-house as are leased to others. The court said:

"Without discussing at length the argument or authorities cited in support of the exemption of the bank building, we content ourselves by extracting from one of the cases what we deem to be the true principle on this question, and the one held by a large preponderance of the authorities, which we have carefully examined. The company is a private corporation, created for banking purposes. It has not conferred on it the general power of purchasing or of becoming owner of real estate, but has the special grant of

power to purchase and hold a lot of ground for the use of the institution as a place of business. In the language of the court in the case of *State v. Commissioners of Mansfield*, 3 Zab. 513, 'this power is limited to, and can only be exercised to effect the purposes for which it was conferred by the government. It is a part of the franchise, and the exercise of the corporate franchise being restrictive of individual rights cannot be extended beyond the letter and spirit of the act of incorporation.' We add, that there is no power conferred to hold real estate for any other purpose than 'for the use of the institution as a place of business.' Such is the language of the charter, and is the only privilege granted. It cannot be extended beyond its terms. To quote again from the above case: 'But there must be a limit somewhere to this power (even if it were not defined in

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the charter), to extend its operations, and hold property exempt from taxation under the exempting clause, that limit must be fixed where the necessity ends and mere convenience begins.' See cases cited in the above case; see, also, *State v. Flarell*, 4 Zab. 371; 3 Harr. 73. We might cite numerous other cases in support of this principle, but deem it too clear to admit of any doubt. The only case cited in support of the exemption, and which we think sustains it, is the case of *New Haven v. City Bank*, 31 Conn. 108. With the reasoning of this opinion and conclusion of the court we are not satisfied; nor do we think it accords with the weight of authority on the question.

"The bill in this case avers that the bank purchased in 1863 a lot of ground, and erected a building thereon, investing in lot and building \$100,000 of its capital stock, and have held and occupied it since for their business, but that the bank does not occupy the whole building for the purpose of the bank, but having constructed the building, the bank occupies a portion, and leases out the balance. Under the principle announced, the exemption can only reach and cover so much of said building as is necessary for the use of the

bank, for the convenient carrying on of its business as a banking institution, and is so used. The balance must be held subject to taxation as other property, and is not covered by the exemption clause of the charter."

In *New Haven v. City Bank*, 31 Conn. 108, it was held that the capital of a bank embraces all its property, real and personal; that where the capital stock of a bank is exempted from taxation by its charter, its banking-house is equally exempt with every other part of its capital; and that if a bank, in violation of its charter, has erected a building not needed for banking purposes, the building is not, for that reason, liable to taxation as the property of the bank when it otherwise would not be, but the bank is liable to be proceeded against by the State for the violation of its charter. In this case the bank leased part of its banking building. The court said: "The primary object of the bank in erecting the building was the accommodation of the proper business of the bank, and the temporary renting of the room was but an incident of the ownership, neither affecting the title to the property nor the right to hold it free from taxation."

HAMBRIGHT V. NATIONAL BANK.

(3 Lea, 40; 31 Am. Rep. 629.)

Bill to recover usury.

A bill in equity will not lie to recover usury from a National bank.

BILL to recover usury. The opinion states the case. The demurrer below was sustained. Both parties appealed.

J. N. Aiken, for complainant.

P. B. Mayfield, for defendant.

FREEMAN, J. This bill is filed to recover usury alleged to have been paid within the last six years. A demurrer was filed, on the ground that the party could only sue for, and recover under, the thirty-fourth section of the National Banking Act as therein provided, and that National banks were not subject to the regulations of the State on this subject. The chancellor overruled the demurrer on these points, but sustained it on another, to wit, that the defendant could not be called on to make a discovery that would expose it to penalties for violations of law. Both parties appealed.

We have heretofore held, as ruled by the chancellor on the first question, and our court has taken jurisdiction of such questions. See case of *Steadman v. Redfield*, September term, 1874. The case of *Farmers and Mechanics' Bank v. Dearing*, 91 U. S. 29; Thomp. N. B. Cas. 117, had not then been decided. This case distinctly holds the contrary doctrine to that laid down by this court. The syllabus of that case is as follows: "The provisions of the National Banking Act, imposing penalties upon National banks for taking usury, supersedes the State laws on that subject. That National banks organized under the act are instruments designated to be used to aid the government in the administration of an important branch of the public service; and Congress, which is the sole judge of the necessity for their creation, having brought them into existence, the States can exercise no control over them, nor in anywise affect their operation, except in so far as it may see proper to permit."

This being a Federal question, over which the Supreme Court of the United States has jurisdiction, we are compelled to yield to the authority of that court, and do so — notwithstanding our previous holding to the contrary.

The result is, that the decree of the chancellor is reversed, the demurrer sustained on the ground stated, and bill dismissed at the cost of complainant, in this court and court below.

Dow v. Irasburgh National Bank of Orleans.

DOW V. IRASBURGH NATIONAL BANK OF ORLEANS.

(50 Vt. 112; 28 Am. Rep. 493.)

Jurisdiction for State courts of suits for usury.

State courts have jurisdiction of suits against National banks to recover money paid as usury.*

ASSUMPSIT, to recover from the defendant, a National bank, moneys paid for usurious interest. The court rendered judgment for defendant for want of jurisdiction; to which the plaintiff excepted.

W. D. Crane, for plaintiff.

W. W. Grout and *L. H. Thompson*, for defendant. The District Courts of the United States are given jurisdiction of cases where National banks are parties. Rev. Stats. U. S., § 563, clauses 1, 15. Section 57 of the National Banking Act, which attempted to confer jurisdiction on State courts in suits brought against National banks to recover the penalty for taking usurious interest named in section 30 of the same act, is unconstitutional. Congress has no authority to confer upon State courts jurisdiction in suits to recover penalties for violation of the laws of the United States. 10 Am. Law Rev. 777-9; 1 Kent's Com. 397, 399, 402, 403; 2 Story's Const., §§ 1755, 1756.

BARRETT, J. This is an action of assumpsit in the common counts. It is not questioned that State courts would have jurisdiction in this form of action where National banks are parties, for causes of action arising *ex contractu* in business transactions. So far as the cause of action set forth in the declaration is concerned, there is no ground for the motion. The specification shows that recovery is sought for money paid to the bank as interest in excess of six per cent. It is therefore claimed that the

* See to same effect, *Eletz v. Columbia Nat. Bank*, ante, p. 366; *Pickett v. Merchants' Nat. Bank of Memphis*, ante, p. 309.

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State court had not jurisdiction, and that for such recovery, the jurisdiction is exclusive in the Federal courts. Whatever might be true in this respect if the suit had been brought to recover the forfeiture of twice the amount of interest thus paid, counting on the U. S. Rev. Stats., § 5198,* in the case in hand the plaintiff does not sue for the forfeiture, but only for the excess above six per cent. The claim is not for a penalty, nor does the suit partake of the character of a penal action. The suit is the same that would be brought to recover money paid as usury under the law of Vermont, which provides that the taking of usury shall subject the taker to a suit and recovery for the excess above six per cent. This case therefore does not fall within either constitutional or statutory provision, by which exclusive jurisdiction is given to the Federal courts of all matters of crime arising upon and under the Constitution and the laws of Congress. Moreover, section 75 of the Banking Act of June 3, 1864, ch. 106, continued in force by ch. 80 of the act of February 18, 1875, expressly confers jurisdiction on State courts of suits, actions and proceedings against any association under said Banking Law, if said courts would have jurisdiction of similar cases under State laws. The county courts of Vermont have jurisdiction of suits and proceedings for the recovery of money paid as usury. So that this case is within the terms and intent of that act of Congress.

We have the note of a case in which the Supreme Court of Maryland, in 1877, held that the State court has such jurisdiction, and that the penalties and forfeitures of which exclusive jurisdiction is given to the Federal courts by section 711 of Rev. Stat. U. S., contemplates only those penalties and forfeitures of a public nature which may be sued for by the government, or some person in its behalf.†

In *Steadman v. Redfield*, 2 Am. Law Times, 624, the Supreme Court of Tennessee, in 1874, decided that the National Currency Act does not prevent an action in a State court against a National

* See *Hade v. McVay*, 31 Ohio St. 231, ante, p. 353.† See *Ordway v. Cent. Nat. Bank of Baltimore*, Thomp. N. B. Cas. 539.

bank, to recover an amount usuriously received in violation of State laws.

In *First Nat. Bank of Whitehall v. Lamb*, 50 N. Y. 95; s. c., 10 Am. Rep. 438, and in *Bank v. Hale*, 59 N. Y. 53, it was held that National banks are subject to the usury laws of the States in which they are located, and that the penalty of the State laws may be enforced in the State courts. In *Cook v. Nat. Bank of Boston*, 52 N. Y. 96; s. c., 11 Am. Rep. 667; Thomp. N. B. Cas. 698, it was held that a Massachusetts National bank may be sued in a New York State court, while in *Central Nat. Bank v. Pratt*, 115 Mass. 539; s. c., 15 Am. Rep. 138; Thomp. N. B. Cas. 595, it was held that National banks are subject only to the laws of Congress as to usury, and the penalty for it, but the jurisdiction of the State courts in that respect is not questioned.

Upon the subjection of National banks to State laws, see *Nat. Bank v. Com.*, 9 Wall. 362; Thomp. N. B. Cas. 34, in which it is said: "It is only when State law incapacitates them from discharging their duties to the government, that it becomes unconstitutional."

In view of the act of Congress conferring jurisdiction on the State courts, and of the cases above cited, we have no hesitation in holding that the State courts of Vermont may take and exercise the jurisdiction thus conferred. It is not necessary, in disposing of the motion in this case, to decide the question, whether the banks, as to usury, are subject to State laws, as held in New York, or only subject to Federal laws, as held in Massachusetts, nor whether, in order to recover the forfeiture, as such, provided in said section 5198 of the Revised Statutes, it would be necessary to count expressly on that section; nor whether, in the present suit, the right of recovery would be limited to two years next prior to the bringing of the suit; or on the other hand, whether the money paid to the bank as usury is to be regarded as having become forfeited on the fact of payment, by reason of being received in violation of law, and so the bank would be holding it without right, and to the use of the party paying it, and therefore it might be recovered in this action at whatever time received within our own statute limitation. Under the motion the

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only question is, can the action be maintained for any purpose? For what the plaintiff may recover in the action is to be determined on the trial under legitimate pleadings, and not upon this motion, by anticipation, and with such limited scope of argument as was addressed to us upon the hearing on this bill of exceptions.

The *pro forma* judgment is reversed, and cause remanded.

Judgment reversed.

HOWARD NATIONAL BANK OF BURLINGTON V. LOOMIS.

(51 Vt. 340.)

Power to take mortgage of realty.

A National bank may take a mortgage of real estate, to secure an antecedent indebtedness, at the time of renewing, and under an agreement for future renewals of the notes evidencing the debt.

FORECLOSURE. The answer averred that on the day of the execution of the mortgage, it was agreed between the mortgagor and the petitioner that if the mortgagor would execute and deliver said mortgage, the petitioner would discount the note therein described and the notes from time to time given in renewal thereof, and that the mortgage should stand as security for each and all of the notes; that notes were given and renewed in accordance with that agreement; that the previously contracted debt, if any such there was, had been paid; that the petitioner was a corporation organized under the National Banking Act; and that the mortgage was void. The opinion states other facts. The petitioner had a decree below.

Wm. G. Shaw, for petitionee Howard. A mortgage to be good under the statute must be for the collection and enforcement of a pre-existing debt, not for its extension and indefinite maintenance. Rev. Stats. U. S., § 5137; *Fowler v. Scully*, 72 Penn. St. 456; s. c., 13 Am. Rep. 699; *Thomp. N. B. Cas.* 854; *Matthews v. Skinker*, 62 Mo. 329; s. c., 21 Am. Rep. 425; *Thomp. N. B. Cas.* 647; *Crocker v. Whitney*, id., 745; *Wiley*

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v. *First Nat. Bank of Brattleboro*, 47 Vt. 546; 19 Am. Rep. 122; Thomp. N. B. Cas. 905; *Whitney v. First Nat. Bank of Brattleboro*, 50 Vt. 388; s. c., 28 Am. Rep. 503 (*ante*, p. 69, *note*). Cases like *Kansas Valley Nat. Bank v. Rowell*, 2 Dill. 371; s. c., Thomp. N. B. Cas. 264, which hold that mortgages given to secure both pre-existing debts and contemporaneous or future advances, may be good as to the former, but invalid as to the latter, are distinguishable from this.

Russell S. Taft, for petitioner.

POWERS, J. The evidence in the case establishes the fact that at the time the petitioner's mortgage was executed no loan of money was made to the defendant Loomis. Loomis was already a debtor to the bank for the full sum covered by the mortgage, and becoming insolvent, the bank procured the execution of the mortgage, not to secure a present loan, not to secure future advances, but to secure his old debt. No question can be made as to the good faith of the bank in taking the security. The provision for a renewal of the note does not have the effect to make the renewed notes evidence of new advances. The mortgage is executed to secure the past advance of money. The new notes are the evidence of the old debt. The mischief sought to be guarded against in the statute prohibiting the loan of money by National banks upon a pledge of real estate security is, the possible investment of their funds in real estate, and that hazard was incurred when the old debt was secured by this mortgage. The provisions for the renewal of the notes made it less probable that the title would vest in the bank than an immediate foreclosure of Loomis' equity.

In view of *Union National Bank v. Matthews*, 97 U. S. (*ante*, p. 12), is the defense here set up valid? In that case the Supreme Court of the United States, whose construction of an act of Congress is paramount, seem to deny the right of the mortgagor and those claiming under him to avoid the mortgage deed on the ground of the want of power in the bank to take it. The doctrine of *ultra vires*, which is getting to be quite fashionable

date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power," etc. The seventh enumeration of express powers is in these words:

"Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin or bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title.

Section 5137 declares that "a National banking association may purchase, hold and convey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it.

"But no such association shall hold the possession of any real estate under mortgage, or the title or possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

These are the only provisions of the said act of Congress which can have any effect to imply a negation of corporate power on the part of the National banks which might be organized under it to make a loan of money on real security. Can they have any such effect? Can their effect be to annul any loan made by any such bank? To release and discharge any deed of trust or mortgage on real estate taken by the bank to secure the payment of any such loan?

We are of opinion that they cannot have any such effect.

It will be observed that none of these provisions prohibit the banks organized under the said act of Congress to loan money on real estate, nor impose any penalty on the act of any such bank in so doing. The most they do is to declare that such banks shall have power to loan money "on personal security." Does this exclude, by necessary implication, the common-law power of such a corporation to loan money on real security, or any other security which would be satisfactory to the bank or might be desired by any persons bound as indorsers for said loan, for their indemnity? And that in the enumeration of the purposes for which, and no others, such an association may purchase, hold and convey real estate are embraced the following, viz.: "Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted." See, also, the third and fourth specifications. How long previously contracted? A year, a month; a week, a day? There is no specification of time which must elapse between the loan and mortgage or deed of trust to make the latter valid. Was it not the object of the specification to indicate that the banks organized under the said act were not to engage in the business of speculating in lands, but in the business of making loans on bills of exchange and other negotiable securities, as incidental, however, to which latter business they were to have the power to take mortgages and deeds of trust on real estate for the better security of said loans, and any persons bound as indorsers for said loans were to have the power to take such mortgages and deeds of trust for their indemnity. Indeed, the third and fourth specifications expressly legalize conveyances of real estate made to any such bank in satisfaction of debts previously contracted in the course of its dealings, or such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it.

But suppose the act of Congress plainly prohibited a bank organized under it to take a deed of trust or mortgage to secure a loan in any case, or made it penal to do so. Would it follow that the deed or mortgage in such case would be void, and that the borrower would be entitled to have the money loaned, and at the same time to hold on to the property which he stipulated to give

or to pledge for its security? For whose benefit could any such prohibition have been made, or such penalty imposed? Certainly not for the benefit of the borrower or his sureties, contrary to his or their express contract, the benefit of which he or they had received. But such a provision could only have been intended for the benefit of the government, which might or might not, at its pleasure, enforce the forfeiture.

Let us now examine some of the authorities referred to on the subject, and see how far they tend to sustain these views.

In a case decided by this court (*Banks v. Poitiaux*, 3 Rand. 136), it was held that, under an act of assembly authorizing a bank to hold so much real property as may be requisite for its immediate accommodation, in relation to the convenient transaction of its business, and no more, the bank may purchase more ground than is necessary for the erection of a banking-house, build fire-proof houses on the vacant land, for the greater security of the banking-house, and sell them out to third persons. And that even if the bank violated its charter in so doing, the only proceeding against it would be by *quo warranto*; and the purchasers of the houses cannot resist a specific performance of their contracts by alleging that the bank had exceeded its powers in erecting and selling the houses.

In another case decided by this court (*Rivanna Nav. Co. v. Dawsons*, 3 Gratt. 19), only three judges were present — BALDWIN, STANARD and BROOKE. BALDWIN, J., delivered an opinion, and the only one that was delivered in the case, in which he said: "But a general prohibition (to purchase real estate) would not be inferred from a mere partial enactment of the incidental common-law power; as for example, from a clause authorizing a bank, or insurance or manufacturing company, to purchase land for its necessary buildings. Such a clause, whether with or without limitation as to quantity or value, would not exclude the incidental power to take mortgages or other securities on real or personal estate for debts due the corporation, or assignments or conveyances of chattels or lands in commutation therefor." "To avoid altogether the contract of a corporation made in reference to the objects of its institution is a measure of extreme rigor, and may be productive

of great injustice to the corporation on the one hand, or to the other contracting party on the other. An incapacity to *take* will not even be inferred from an inhibition to *hold*, though the policy of the latter be to prevent the accumulation by the corporation of a specified description of property, if the purpose of the conveyance be a sale of the property by the corporation and the application of its proceeds to the objects contemplated by the charter. This proposition, reasonable in itself, may be fairly deduced from the cases of *Banks v. Poitiaux*, 3 Rand. 136; *Leazure v. Hillegas*, 7 S. & G. 313, and *Baird v. Bank of Washington*, 11 id. 411." "At most, the act is only voidable on the ground of misuser or abuse of the franchise, and cannot be drawn in question collaterally, especially by those having no longer any interest in the subject. *Banks v. Poitiaux*, *supra*; *Silver Lake Bank v. North*, 4 Johns. Ch. 370." STANARD, J., concurred in the results of BALDWIN's opinion. BROOKE, J., dissented.

The cases of *Silver Lake Bank v. North*, 4 Johns. Ch. 370; *Leazure v. Hillegas*, 7 S. & R. 313, and *Baird v. Bank of Washington*, 11 id. 411, above referred to, were cited and much relied upon by the learned counsel for the appellees in this case, and have an important bearing upon it.

In *Silver Lake Bank v. North*, which was decided by that great judge, Chancellor KENT, he said: "Another objection is, that the plaintiff had no right to take a mortgage concurrently with the loan, in order to secure it; and that their charter only authorized them to take mortgages for debts previously contracted. If this objection was strictly true in point of fact, I should not readily be disposed to listen to it. Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the government of Pennsylvania to exact a forfeiture of their charter than for this court, in this collateral way, to decide a question of misuser by setting aside a just and *bona fide* contract. But if we were driven to that necessity, we might, on colorable grounds, consider this to be a mortgage to secure a debt previously contracted, for it is in proof that previous to

the date and execution of the mortgage the plaintiff had agreed to loan the money; and it was loaned and paid when the mortgage was delivered. The debt may be said to have been contracted for at the time of the agreement, and the mortgage taken for its security. But I do not rest on any verbal criticism of the kind. If the loan and the mortgage were concurrent acts, and intended so to be, it was not a case within the reason and spirit of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property and engaging in land speculations. A mortgage taken to secure a loan, advanced *bona fide* as a loan, in the course and according to the usage of banking operations, was not, surely, within the prohibition."

In *Leazure v. Hillegas*, *supra*, the act of 17th March, 1787, enabled the Bank of North America to have, hold, purchase, etc., lands, etc., and also to sell, etc., the same lands, etc., provided that such lands, etc., which the said corporation was thereby enabled to purchase and hold, should only extend to such lots of ground and convenient buildings, etc., as they might find necessary for carrying on the business of said bank, etc., and should actually occupy; and to such lands and tenements as were or might be *bona fide* mortgaged to them as securities for their debts. It was held that the bank might purchase absolutely lands in a distant county which they did not occupy, though their title, like that of an alien, is defeasible by the Commonwealth; and if they convey to a third person without claim by the Commonwealth, such third person holds the same estate defeasible in like manner. The unanimous opinion of the court in the case was delivered by TILGHMAN, C. J.

In *Baird v. Bank of Washington*, *supra*, it was held, that where, by the act of incorporation, a bank is empowered to hold "such lands as are *bona fide* mortgaged or conveyed to it in satisfaction of debts previously contracted in the course of its dealing," it has a general power to commute debts *really due* for real estate; and this power does not depend upon whether, in the opinion of the jury the debt was in danger, and prudence required that the real estate should be taken in satisfaction of it. But it seems that

even if the bank could not hold such real estate, the acquittance of the debt would not be void and the parties remitted to their original rights; for the bank may take for the benefit of the State, which alone can take advantage of the defect of the title. It seems, too, that if the conveyance was not directly to the bank, but to trustees with a view not to permanent ownership, but to raise money by a sale of the property, it would be forbidden neither by the spirit nor the letter of the act of incorporation.

Several cases have very recently been decided by the Supreme Court of the United States, construing the National Bank Act in question, which are entitled to great weight in the decision of the question now under consideration, as well because of the recency of their decision as because of their being adjudication of the highest, or at least, one of the highest, tribunals in the land, construing an act of Congress (the very act we have under consideration) which bears the same relation to that tribunal which an act of a State legislature bears to the highest appellate court of that State.

One of these is the case of *Gold Mining Company v. National Bank*, decided in October, 1877, and reported in 6 Otto, 640, Thomp. N. B. Cas, 151, in which it was, among other things, held, that a defendant, sued by a National bank for moneys it loaned him, cannot set up a bar that they exceeded in amount one-tenth part of its capital stock actually paid in. The court in its opinion said: "The first objection to the recovery arises from the amount of the debt. The plaintiff is a National bank organized under the act of Congress of June 3, 1864, with a capital stock of \$50,000. By the twenty-ninth section of that act it is provided as follows: The total liabilities to any association of any person or of any company, etc., for money borrowed, etc., shall at no time exceed one-tenth of the amount of the capital stock of such association actually paid in. Rev. Stat., § 5200."

"After obtaining and holding to its own use the money, can the mining company be allowed to interpose the plea that the bank had no right to loan the money? In *Harris v. Runnels*, 12 How. 79, where the defendant sued upon a note set up the illegality of its consideration, it was held that the whole statute

Wooten's Assignee v. Armat.

then in question must be examined to discover whether it tended to prevent courts of justice from enforcing the law in relation to the act prohibited; and that when a statute creates an act, or annexes a penalty for its commission, it does not follow that the manifest purpose of the act was meant to avoid the consequences made in its contravention of it. A statute provided that no slave should be brought into the State without a previous certificate signed by two freeholders. Slaves were brought in without certificate and sold, and the purchaser was held liable for the purchase-money. Mr. Justice SWAYNE said that the rule was not for the benefit of either party to the illegal contract, but was grounded upon grounds of public policy.

"In *O'Hare v. Second National Bank of Titusville*, 7 St. 96; Thomp. N. B. Cas. 869, the question was made as to the constitutionality of a statute we are considering, and it was objected that the bank could not recover the amount of the loans in excess of the proportion specified. The court held that the section of the act referred to was intended as a rule for the government of the bank, and that the loan was not void. See, also, *Pangburn v. Westlake*, 36 Iowa, 546; *Vining v. Bricker*, 14 Ohio St. 100.

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The opinion of the court was delivered by Mr. Justice HENRY, and the judgment of the court below was unanimously affirmed. See, also, *Haycard v. National Bank*, 6 Otto, 611 (*ante*), 1

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by the bank itself, or indirectly by the maker and indorser of the note. Had such security been obtained by the maker and indorser of the note by a deed of trust executed on the Exchange hotel for their indemnity, no question would have been raised as to the validity of the deed or of the note, to secure the payment of which it would have been executed. What difference can it make that the deed of trust was executed to secure the payment of the note without expressly and literally providing for the indemnity of the maker and indorser? Is not the effect precisely the same?

Then again, the money was not invested in the purchase of real estate. Nor was it borrowed upon the security of real estate for the purpose of being expended otherwise than upon that estate. On the contrary, it was borrowed to be expended upon that estate, in making it, from being an expensive and unproductive building, a first-class hotel, so necessary to the prosperity of the city, in which all its citizens were deeply interested, as was also the State at large. At that time no expenditure was considered more important for the city, or more prudent and proper, looking to the interest of the owners of the hotel. Property in and about Fredericksburg, soon after the war, took a rise, and it was hoped and believed would continue to rise, so that the completion of the hotel would be beneficial alike to its owners and the public. For several years after the hotel was completed it was leased out for a large sum, as much as \$2,500 per annum, which, if it had continued for a few years, would have enabled the company to have paid off all its debts. Had that reasonable and expected result followed, all would have commended the propriety and prudence of what was done in regard to the completion of the work. But instead of such a result there was a sudden and unexpected change in the times and in the value of real estate in and about Fredericksburg. The tenants of the Exchange hotel became bankrupt, the property became of little value, and could be rented out but for little if any more than enough to pay the amount of taxes and insurance annually due thereon, and the sale of the property became necessary to pay the amount which had been borrowed to complete the hotel.

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Is it reasonable or right that such an improbable and unexpected result should produce a radical and complete change in the rights of the parties?

We think not, and we are therefore of opinion that, upon general principles, the National Bank of Fredericksburg is entitled to priority of payment of the debt due to it by the Exchange Hotel Company of Fredericksburg over the debts due by the said company to the appellant, A. B. Botts, as assignee in bankruptcy of G. W. Wroten.

[Omitting other points.]

Decree affirmed.

FIRST NATIONAL BANK OF NORTH BENNINGTON v. TOWN OF BENNINGTON.

Negotiable paper — coupons.

A National bank may take, hold, and sue upon coupons issued with and annexed to town bonds, but payable to bearer, and separated from the bonds, and assumpsit is the proper form of action.

(United States Circuit Court, District of Vermont.)

THE opinion states the case.

Edward J. Phelps and George W. Harman, for plaintiff.

Charles N. Davenport, Tarrant Sibley and A. B. Gardner, for defendant.

WHEELER, J. This is a motion for a new trial, in an action of assumpsit upon the coupons from the bonds of the defendant, issued in aid of the Lebanon Springs Railroad Company, a corporation existing under the laws of New York, under No. 1 of the special session laws of Vermont, 1867, after a verdict for the plaintiff, directed by the court, at last term.

The grounds urged in support of the motion are, that upon the evidence in the case, the action cannot be maintained, because

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the bonds are under seal, and therefore assumpsit is not the proper form of action; that the statute under which the bonds were issued is contrary to the Constitution of the State; and that the plaintiff is without authority under the law to take and hold such instruments and maintain any action upon them.

The statute authorized the issuing bonds or notes, with interest coupons attached, the bonds to be signed by the selectmen, and the coupons by the treasurer, of the towns. The bonds are under seal; the coupons are signed as the statute requires, and are not under seal. Each coupon contains an express promise to pay. It reads: "The town of Bennington will pay to the bearer," etc. It was intended to be separated from the bond, and to be evidence in itself of a debt, and to be paid and taken up as such. It is a negotiable instrument, and if valid, constitutes a cause of action in the hands of any holder. *Knox Co. v. Aspinwall*, 21 How. 539; *Knox Co. v. Wallace*, id. 546. Therefore a judgment upon one coupon, or a set of coupons, from a bond, is not conclusive between the same parties, or their privies, for or against the validity of other coupons from the same bond, unless the validity of all of them was tried and determined. *Cromwell v. County of Sac*, 94 U. S. 351. When a coupon is sued, an appropriate action to recover upon it, according to its nature, must be brought. These coupons are, in their nature, simple contracts, and assumpsit, although not the only remedy, for debt would lie, is a proper remedy. It was maintained upon similar coupons in *Aurora v. West*, 7 Wall. 82.

[Omitting another question.]

The statute (Rev. Stat. U. S., § 5136, Seventh) authorizes National banks, of which the plaintiff is one, to exercise all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt, etc. These coupons are doubtless promissory notes, within the statute 3 and 4 Anne, ch. 9, and of this statute, both of which use the term in the same sense, unquestionably. They are also evidences of debt. The coupons, and the right to sue upon them, are all that are now in

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question. No intimation of any views concerning the right to take and hold the bonds is intended by this discrimination, however.

The motion is overruled, and judgment entered on the verdict.

HARVEY, Receiver, v. ALLEN.

(16 Blatchf. 20.)

Receiver — attachment — equitable relief.

After a circulating note of a National bank had been protested for failure to redeem it in lawful money, an attachment from a State court was levied on moneys of that bank deposited in another National bank to secure a debt to A. Subsequently a receiver of the first bank was appointed, and without becoming a party to the suit, applied to the State court to dissolve the attachment, which motion was denied. He then brought this suit against A, the second bank, and the sheriff, to assert his title to such deposit. *Held*, that the levy was void, and he was entitled to the relief asked.

(United States Circuit Court, Southern District of New York, 1879.)

THE opinion states the case.

George Bliss, for plaintiff.

Michael H. Cardozo, for Allen, Stephens & Co.

Aaron J. Vanderpoel and *J. Sterling Smith*, for Broadway Bank and the sheriff.

BLATCHFORD, J. The Scandinavian National Bank of Chicago was a bank organized under the National Banking Act and subject to its provisions. It was located at Chicago, Illinois. On the 10th of December, 1872, it failed to redeem a circulating note of the denomination of \$5, issued by it, when payment thereof was legally demanded at its office in Chicago, during the usual hours of business. On the same day a notary public duly protested said note for non-payment, and served a written notice of the protest on the president of the bank, and it stopped doing

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business, and a United States bank examiner took possession of all its books and assets. Section 46 of the act of June 3d, 1864 (13 U. S. Stat. at Large, 113), provides, that if any National bank shall fail to redeem in lawful money any of its circulating notes, when payment thereof shall be lawfully demanded, during the usual hours of business, at its office, they may be protested by a notary public. The notary is required to give notice of the protest to the president or cashier of the bank, and to forward notice of the protest to the Comptroller of the Currency. Section 50 authorizes the Comptroller, on becoming satisfied, as above specified, that any bank has so refused to pay its circulating notes and is in default, to forthwith appoint a receiver, who, under the direction of the Comptroller, shall take possession of the books, records and assets of the bank, and collect its debts. Provision is made for the receiver to turn the assets into money and pay such money to the Treasurer of the United States, and for the Comptroller to distribute such money *pro rata* among the creditors of the bank. Section 52 is in these words: "All transfers of the notes, bonds, bills of exchange and other evidences of debt owing to any association, or of deposits to its credit, all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." On the 18th of December, 1872, the Comptroller, by an instrument in writing reciting the necessary preliminary facts, appointed the plaintiff in this suit to be receiver of said bank, with all the powers, duties and responsibilities given to or imposed upon a receiver under the provisions of said act. At the time the Scandinavian Bank failed, the National Broadway Bank, another National bank, located in the city of New York, and one of the defendants in this suit, had on deposit moneys belonging to the Scandinavian Bank, subject to its draft. On the 9th of December, 1872, the defendants Allen,

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Stephens and Blennerhassett, composing the firm of Allen, Stephens & Co., held a sight draft drawn by the Scandinavian Bank on the Broadway Bank, for \$650. On that day they presented the same for payment to the latter bank, but it was not paid, and thereupon it was duly protested and notice given to the former bank. On the 12th of December, a warrant of attachment was issued out of the Supreme Court of New York, on the application of Allen, Stephens & Co., in an action in said court by them against the Scandinavian Bank, to recover \$650, with interest from December 9th, and on the ground that said bank was a foreign corporation organized under said act of 1864, commanding the sheriff of the city and county of New York to attach and safely keep all the property of said bank within his county, or so much thereof as might be sufficient to satisfy the said demand, together with costs and expenses. On the 13th of December, this attachment was levied by the defendant Brennan, as such sheriff, on the moneys of the Scandinavian Bank in the possession of the Broadway Bank. A summons was issued in said action, dated December 12th, demanding judgment for \$650, with interest from December 9th, and costs. A complaint, setting forth the cause of action, was verified December 18th. On the 19th of December, in accordance with the State practice, an order was made by the State court, that the summons be served by publication in two newspapers, and that a copy of the summons and complaint be deposited in the post-office, directed to the Scandinavian Bank, as defendant. On the same day the summons and complaint were filed in the State court. On the 8th of February, 1873, the attorney of the United States for this district caused an affidavit to be made by Mr. Tremain, entitled in the suit in the State court, reciting the proceedings therein, and setting forth that the Scandinavian Bank had suspended and become insolvent December 9th, 1872; that Mr. Harvey had been appointed its receiver by the Comptroller, under said act; that he, said attorney, had "been instructed to act for said receiver in and about the matters and proceedings appertaining to the claim of" Allen, Stephens & Co.; and that, upon the facts so stated, and all the proceedings in said suit, and upon the ground, among others, that the State

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court had no jurisdiction, and that the continuance of the proceedings in said action, and of said attachment, was in violation of said act of Congress, and that said attachment was issued after the commission of an act of insolvency by the Scandinavian Bank, and with a view to prevent the application of its assets, as prescribed in said act, and to prefer Allen, Stephens & Co., securing to them their claim in full from such assets in preference to other creditors, or the ratable proportion of said assets that might be found due to them under said act, the said attorney desired to move, in behalf of the defendant, to vacate said order of publication and warrant of attachment, and to stay the proceedings in said action. On said affidavits, and on an affidavit by said attorney, that one of the circulating notes of the bank was protested on December 10th, for non-payment and non-redemption, and that such fact was duly certified to the Comptroller of the Currency, a motion to the above effect was made before the State court, on the part of the defendant, by counsel who appeared for it for the purpose of the motion. The court, on the 5th of March, 1873, denied the motion, at Special Term, holding, that, so far as the defendant was concerned, the attachment was properly granted, and that, in accordance with the decision of the Court of Appeals of New York, in *Tracy v. First National Bank of Selma*, 37 N. Y. 523, it must be held, that the receiver had no *status* in the action to make a motion to vacate the attachment, but must assert his title in some other manner. The point of the decision in the *Tracy* case was, that the receiver, not being a party to the suit, could not make any motion in it. The Scandinavian Bank, then, by the said attorney, who appeared for it for that purpose, took an appeal to the General Term of the State court, from the order denying such motion. On the 16th of May, 1873, the General Term affirmed the order appealed from. The receiver did not make himself a party to the suit in the State court, but, in May, 1873, he filed the bill in this suit. An amended bill was filed in June, 1873. It sets forth the substance of the matters above stated. It alleges, that, when the Scandinavian Bank became insolvent, the Broadway Bank had in its possession "certain assets" of the former bank, "and, among

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the same, the sum of about fifteen hundred dollars, more or less, in currency, or otherwise," which the plaintiff, as receiver, and in behalf of himself and said Comptroller, was entitled to demand and receive from the latter bank, and that the same has been demanded, but the latter bank has refused to deliver the same to the plaintiff or to said Comptroller, or to make any other disposition of the same that will enable the plaintiff to pay the same into the Treasury of the United States. It alleges that the claim made under said attachment is contrary to law. It prays that an injunction may be issued, restraining the Broadway Bank from paying over said moneys to any one but the plaintiff; that Allen, Stephens & Co. and said sheriff be enjoined from proceeding on said attachment, or entering any judgment or order in said suit, or on their said claim, save in the way of presenting the same to the plaintiff as receiver, as claims entitled to no preference over those of the general creditors of the Scandinavian Bank; that the Broadway Bank pay to the plaintiff, to be by him paid into the Treasury of the United States, the said sum of \$1,500, "be the same more or less," with interest; and that a receiver of said moneys, during the pendency of this suit, be appointed.

Allen, Stephens & Co. answered, in October, 1873, setting up their claim, and said attachment and the proceedings in said suit in the State court. Their answer also set forth, that on the 13th of September, 1873, a judgment was recovered in said suit, against the Scandinavian Bank, for \$829.84; that, on the same day, an execution was issued on said judgment, to said sheriff; that said sheriff collected on said execution, and under said attachment, from said Broadway Bank, and paid to Allen, Stephens & Co., on the 20th of September, 1873, \$820, in full satisfaction of said judgment and of all claim of theirs under said attachment; and that Allen, Stephens & Co. claim no interest in any indebtedness of the Broadway Bank to the Scandinavian Bank, or in any of the assets of the latter bank.

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The Broadway Bank answered, in October, 1873, setting up the attachment and the proceedings in the suit in the State court, and the judgment and execution, and the taking by the sheriff from the attached moneys in the hands of the Broadway Bank, of sufficient to satisfy the execution; that said bank has in its possession \$568.51 of said deposits of the Scandinavian Bank, and no more, subject to the order of the bank, or its legal representatives or assigns; and that said bank has not refused to pay any of said deposits to the plaintiff, except such as were so attached by the sheriff, amounting to \$876.94.

On the 9th of January, 1873, the plaintiff directed the Broadway Bank to credit itself in account with \$153.20, for a collection made by the Scandinavian Bank. On the 17th of January, 1873, the plaintiff wrote to the Broadway Bank as follows: "Your favor of 14th inst., inclosing acc't current, received. I have had it compared with the books of this bank and find it correct. You will please send me your check for balance, less amount of the two attachments and sufficient to cover costs, say about \$100 in each case. The United States District Attorney in New York has been instructed from Washington to defend these suits, and, until decided, of course you will retain sufficient to indemnify you." On the 18th of January, 1873, the Comptroller of the Currency wrote to the Broadway Bank as follows: "I am informed that you have on deposit, to the credit of the Scandinavian National Bank of Chicago, \$2,669.35 in gold, and \$2,461.14 in currency, and that suits of attachment have been brought against the bank—one for \$650 and the other for \$441.95. This bank having been placed in the hands of a receiver, you will, on the receipt of this letter, forward the balance due the Scandinavian National Bank, less the amount which has been attached, to this office, which amount will be deposited with the Treasurer, in trust, subject to my order, for the benefit of its creditors, as provided by the National Currency Act." On the 21st of January, 1873, the Comptroller wrote to the Broadway Bank as follows: "I have received your letter of the 20th, in-

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closing your certificate of deposit for \$2,664.35 gold, being balance of coin account of the Scandinavian National Bank; also your certificate of deposit for \$1,015.69, being balance of currency account, less the sum of \$1,445.45, retained to abide the result of two attachments and probable costs thereon. Please inform me of the amount of those attachments and the amount retained for costs." The \$1,445.45 was the balance of the account made up with interest to December 9th, 1872, but not later. The amount paid to the sheriff by the Broadway Bank, September 20th, 1873, was \$876.94. The second attachment referred to in the correspondence was one by McKim, Brothers & Co. The record does not show how it was disposed of, but it is not set up by any of the defendants. McKim, Brothers & Co. were originally made parties defendant to this suit, but the suit was discontinued as to them. The Broadway Bank and the sheriff appeared in this suit on the 5th of July, 1873, and Allen, Stephens & Co. appeared on the 7th of July, 1873. A motion was made, on notice to all the defendants, for an injunction to restrain the Broadway Bank from paying over to any person but the plaintiff the moneys mentioned in the bill, and for the appointment of a receiver to hold said moneys until the final determination of this suit, and for an injunction to restrain all the defendants from interfering with such disposition of said moneys pending the determination of this suit, but such motion was denied by this court by an order filed September 18th, 1873.

The case has now been brought to final hearing on pleadings and proofs. It is contended for the Broadway Bank, that the proceedings in the suit in the State court are binding on the plaintiff, and are a bar to the relief asked by the bill in this suit; that the State court had jurisdiction of the suit brought in it, and properly issued the attachment; that the bringing of this suit did not divest the State court of the jurisdiction it so acquired; that that court had authority to proceed in such action, and render and enforce judgment therein, so long as no defense was interposed, and so long as the insolvency of the Scandinavian Bank was not brought to the knowledge of that court in any manner of which it could take cognizance; that the plaintiff, on motion

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cation of its assets can be obtained by adversary proceedings, so as to defeat such design. It is further said, that all objection to the right of the receiver to appear in the State court and move for the discharge of the attachment and the abatement of the suit, or to contest the case at the trial, was waived, because such right was not objected to at the time. The court add: "But independently of this consideration, we are of opinion, that it was a proper proceeding on the part of the receiver to apply to the court below to discharge the attachment, on proof of the facts presented by him and the production of his appointment and the decree dissolving the injunction. Invested with the rights of the bank to the possession of the property, by his appointment, it was his duty to take the necessary steps to remove the levy. That levy was void as against his claim to the property; and, in our judgment, it was error for the court to refuse to discharge it on his application."

In the present case, the receiver applied to the State court to vacate the attachment, and his application was refused, on the ground that he had no status in the action to make such an application. He was told that he must assert his title in some other manner. Two ways were open. One was to be made a party defendant to the suit in place of the bank. The other was to bring this suit. He brought this suit promptly, the bill being filed five days after the order of the General Term was made, affirming the order denying the motion to vacate the attachment. In the *Colby* case, the receiver was treated by the State court and by the Supreme Court of the United States as if he were a party to the suit, and his rights as against those of the attaching creditor were adjudicated directly in the suit brought by the attaching creditor. In the present case, the receiver, before any thing of substance had been done in the suit in the State court, toward a judgment, except to issue and serve the attachment and publish the summons, filed the bill in this suit, making all parties interested defendants, setting up all the facts, and praying proper relief. The bill seeks a determination of the conflicting claims. It presents a case of equitable cognizance. On the facts set forth, the plaintiff was entitled, on final decree, to the relief prayed,

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except in respect of the injunctions asked for. It must be assumed that the application for a preliminary injunction and for a receiver was refused because it was not shown that the fund was in peril, as respected the Broadway Bank, and because the court felt itself restrained by positive statute from enjoining the proceedings of Allen, Stephens & Co. in the State court. The answers do not set up that there is a plain, adequate and complete remedy at law. The plaintiff was not a party to the suit in the State court. The answers do not set up the pendency of the suit in the State court in bar of this suit. The rights of the plaintiff must be adjudicated as they stood when this suit was brought. The defendants, when served with process in this suit, were notified of the plaintiff's claim. Such process was served on Allen, Stephens & Co., and the Broadway Bank on the 22d of May, 1873. The original bill contained, in substance, the allegations found in the amended bill, except that it did not contain a prayer for an injunction against the Broadway Bank, nor any prayer for the appointment of a receiver. The amended bill prays "that the conflicting claim to said moneys, set up by the several defendants herein, may be forever foreclosed and determined by the decree herein, and that complainant may be adjudged entitled to said moneys, to the use of his said office." That prayer in that form is not found in the original bill. The original bill made McKim, Brothers & Co. parties, with proper averments as to their attachment, but the amended bill drops them as parties and omits such averments.

The plaintiff did not, in any manner, submit himself to the jurisdiction of the State court, in such wise, as to be bound by the judgment in the attachment suit, nor did he submit his rights to the adjudication of that court. When he applied to that court to vacate the attachment he was told that he had no standing to so apply, and that he must make himself a party to the suit, and submit his rights to adjudication therein, before he could be heard therein. He then came into this forum, before any thing more was done in the suit in the State court, and brought into this court all the parties to the controversy. He took the proper step to establish his trust as respected the fund in the hands of the Broadway Bank, by coming into this court of

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equity. The principle of the case of *Eyster v. Gaff*, 1 Otto, 521, has no application to a case like the present. The attachment levy being void as against the receiver's claim to the fund, and the State court having erroneously refused, on his application, to vacate the attachment, and having refused to adopt views such as are asserted in *National Bank v. Colby*, the receiver was under no obligation to become a party to the suit in the State court, even though he might ultimately have the adverse judgment of the highest State court reversed by the Supreme Court of the United States, as was done in *National Bank v. Colby*. The moment he came into this court with the other parties to the controversy, there could no longer be any pretense that any thing afterward done in the suit in the State court could affect his rights. From that time the defendants went on at their peril, in disposing of the fund in the Broadway Bank, and the plaintiff is entitled to an adjudication of his rights here, as of the time he brought the defendants into this court, even though there was no preliminary injunction granted nor any receiver appointed.

It is contended, for the Broadway Bank, that, if it be held that the plaintiff is entitled to the relief he asks for in this suit, the court should proceed and adjust the equities between that bank and Allen, Stephens & Co., and that such adjustment should be an adjustment of all matters contained in the pleadings and the testimony, without regard to whether such matters occurred before or after the commencement of this suit; that the proceedings which were subsequent to the commencement of this suit are set forth in the three answers, and there is no dispute about those facts; that the defendants cannot object to an adjudication being had upon facts which they themselves plead; that, at the commencement of this suit, the Broadway Bank was a mere stockholder; that the payment to the sheriff was made under the pressure of legal process, and cannot be deemed a voluntary payment; that, if the court should decide in favor of the plaintiff, it should decree that Allen, Stephens & Co. pay to the plaintiff the amount which the Broadway Bank paid to the sheriff, and that the Broadway Bank pay to the plaintiff the \$568.51, or, if a decree be given against the Broadway Bank for

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the full amount in its hands at the commencement of this suit, there should also be a decree in favor of said bank against Allen, Stephens & Co. for the \$876.94; and that the satisfaction of the judgment of Allen, Stephens & Co. against the Scandinavian Bank should be cancelled, and the plaintiff, as receiver, be ordered to pay the proper dividend on such judgment to Allen, Stephens & Co. or to the Broadway Bank, whichever may appear, according to the other provisions of the decree, to be entitled to such dividend.

On behalf of Allen, Stephens & Co. it is contended, that no decree can be made in this suit compelling Allen, Stephens & Co. to refund any part of the money which was paid to them under the judgment; that the identical money attached did not belong to the Scandinavian Bank; that the co-defendants of Allen, Stephens & Co. do not, in their answers, make any claim for affirmative relief against Allen, Stephens & Co.; that, if the Broadway Bank was merely a stakeholder, it could have gone into a court of equity, have filed a bill of interpleader, have paid the money into court, and thus have relieved itself from all liability in the matter; that, having failed to do so, it cannot now, as against Allen, Stephens & Co., and to their prejudice, claim any relief; and that the payment to the sheriff by the Broadway Bank was a voluntary payment, made without protest or objection, and, at most, under a mistake of law and not of fact.

The bill in this case sets forth a case of equitable cognizance arising out of trust. It alleges that the Comptroller of the Currency, on the insolvency of the Scandinavian Bank, and the seizure of its assets, and the protest of its circulating note, became vested in trust with such assets, for the creditors and others interested under the provisions of the act of Congress, and as an officer of the United States, and has continued so vested and has exercised charge and trust over and in all such assets and property, and lawfully has been entitled to the actual custody and possession of the same, and, through the plaintiff, to demand and collect the same under the provisions of the act of Congress. It sets out that, at the time the Scandinavian Bank became insolvent,

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the Broadway Bank had in its possession certain assets of the former bank, namely, said moneys, which the plaintiff, as receiver, and in behalf of himself and said Comptroller, was entitled to demand, and receive manual custody of, from the Broadway Bank, but the latter bank refuses to deliver the same to the plaintiff or to the Comptroller, or to make any disposition of the same that will enable the plaintiff to pay the same into the Treasury of the United States, which his duty in the premises, and a proper performance of the trusts aforesaid, requires to be done. It then sets forth, that Allen, Stephens & Co. claim a part of said funds, under their attachment. It prays that the moneys, assets of the Scandinavian Bank, in the hands of the Broadway Bank, be paid to the plaintiff, in aid of and to enforce the discharge of said trust, in behalf of himself and the said Comptroller. The attachment issued was an attachment against the property of the Scandinavian Bank. It is set up as such in the answer of Allen, Stephens & Co. Although, as between the Broadway Bank and the Scandinavian Bank, the former was a debtor to the latter for the moneys on deposit, yet, before the attachment of Allen, Stephens & Co. was levied, a trust had, under the act of Congress, become impressed upon the moneys on deposit in the Broadway Bank, and such trust remained impressed upon them at all times afterward, and followed such of them as were paid by that bank to Allen, Stephens & Co. Allen, Stephens & Co. did not take them as *bona fide* purchasers without notice, but took them with full knowledge of all the facts and of this suit. The forms of proceeding in a court of equity are flexible, to suit the different postures of cases. It may model the remedy, so as to suit it to controlling equities and the real and substantial rights of all the parties. It can adapt its decree to all the varieties of circumstances which may arise, and adjust it to all the peculiar rights of all the parties in interest. 1 Story's Eq. Jur., § 28. In adapting its decree to the special circumstances of a case, a court of equity will adjust all cross equities, when all the parties in interest are before the court, so as to prevent multiplicity of suits. *Id.* 437. Allen, Stephens & Co. having taking the \$876.94 from the Broadway Bank, pending this suit, wrongfully, as against such

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bank and the plaintiff, without any title to it, and under a levy which was void as against the plaintiff's claim to the money, must be compelled to restore the money to the condition in which it was when this suit was brought, so that the Broadway Bank may respond for it to the plaintiff. It does not lie with Allen, Stephens & Co. to claim any advantage from their unlawful exaction from the Broadway Bank, or to complain that said bank paid the money to them and did not file a bill of interpleader and bring such money thereon into court. All parties had been brought into this court by this suit, and their rights placed *sub judice*, and Allen, Stephens & Co. cannot be heard to say that the Broadway Bank should have brought another suit. It is, therefore, proper that there should be a decree that Allen, Stephens & Co. respond to the plaintiff directly, in the first instance, for the money they received, and that the Broadway Bank should not be called upon to pay such money until there has been a failure to collect it on execution from Allen, Stephens & Co. The Broadway Bank might have brought the whole money into this court, in this suit, before paying any part of it to Allen, Stephens & Co., and, therefore, as respects the plaintiff, who did not assent to the disposition made of the money paid to Allen, Stephens & Co., the Broadway Bank should respond to him for the money it paid to Allen, Stephens & Co., if such money cannot be collected, on execution, from Allen, Stephens & Co.

The Broadway Bank claims that it should not be charged with costs, on the ground that what money it did not pay over it retained with the assent of the plaintiff or of the Comptroller, and that the plaintiff made no demand for the money which the McKim attachment covered. Whatever assent was given before this suit was brought, to the retaining of the Broadway Bank of enough money to cover the two attachments, the bringing of this suit was a withdrawal of such assent, and was a sufficient demand for all the money. As against the plaintiff, the Broadway Bank might have brought the money into this court, in this suit, or, knowing, as it did, of the plaintiff's claim and of the conflicting claim of Allen, Stephens & Co., it might have brought a proper proceeding of interpleader, in a proper court, before this suit was

brought. It made no effort to obtain relief from the State court in the suit brought by Allen, Stephens & Co. It is shown, by the order filed September 18th, 1873, to have opposed the granting of an injunction against itself by this court, from paying over the moneys to any one but the plaintiff, and to have opposed the appointment of a receiver of those moneys. It asserts, in its answer, the invalidity of the plaintiff's claim, as against that of Allen, Stephens & Co., to such moneys. Under these circumstances, it ought to pay costs to the plaintiff.

The Broadway Bank claims, that if it is not awarded costs against the plaintiff, it should have costs against Allen, Stephens & Co. The court cannot award the costs of the Broadway Bank against Allen, Stephens & Co., as that would be, in effect, a decree between co-defendants. 2 Daniell's Ch. Pr. (4th Am. ed.) 1406, 1407. If the Broadway Bank had put itself in a position to be relieved from paying costs to the plaintiff, then, as Allen, Stephens & Co. have, by their own conduct, occasioned this suit, the court might deem it proper to order the plaintiff to pay costs to the Broadway Bank, and then allow him to receive such costs again from Allen, Stephens & Co. *Id.* But the considerations before adverted to, on the question of costs, as between the plaintiff and the Broadway Bank, indicate that the costs of the Broadway Bank ought not to be paid by Allen, Stephens & Co.

Allen, Stephens & Co. claim that they should have costs from the plaintiff, on the ground that the plaintiff in his bill asks no relief against them except an injunction and a receiver *pendente lite*. This is a mistake. The bill asks for a perpetual injunction against Allen, Stephens & Co., both as originally filed, and as amended, from further proceeding on their attachment and from obtaining any judgment or order in their suit. This court is inhibited from granting such relief. Act of March 2d, 1793, 1 U. S. Stat. at Large, 334, § 5, now § 720 of the Revised Statutes. But the bill sets out the illegality of the claim of Allen, Stephens & Co., and the wrong and injury to the plaintiff by what Allen, Stephens & Co. had done, and prays for a decree determining the conflicting claims to the moneys, and for an adjudication that the plaintiff is entitled to said moneys to the

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use of his office, and for such other or further relief as may be proper, and for costs against all the defendants. Clearly, Allen, Stephens & Co. ought not to have costs from the plaintiff, but ought to pay costs to him.

The sheriff was a proper party to the suit, as a claimant to the money. He ought not to have costs against the successful plaintiff. Nor ought he ultimately to pay the costs of the plaintiff, yet the plaintiff ought to have the costs of making the sheriff a party. But, as the sheriff was merely a ministerial officer, and as the wrongful conduct of Allen, Stephens & Co. made it necessary to bring in the sheriff as a party, the proper course is for the plaintiff to recover against Allen, Stephens & Co. his costs of making the sheriff a party, and also the costs of the sheriff's defense, the latter costs to be paid over to the sheriff by the plaintiff, when collected. Such is the practice laid down by Daniell, as above cited.

A decree will be entered establishing the plaintiff's rights, as set forth in the bill, as against the claim of Allen, Stephens & Co. and their suit and attachment and judgment, to the \$1,445. 45, with interest from May 22d, 1873, the time when process on the original bill was served on the Broadway Bank. The correspondence between that bank and the Comptroller, and that bank and the receiver, relieves it from interest prior to the bringing of this suit. The decree will provide that the Broadway Bank is liable to the plaintiff for such sum and such interest; that, toward paying it, Allen, Stephens & Co. are liable to the plaintiff for \$876. 94, with interest from September 20th, 1873; that execution issue against Allen, Stephens & Co. for that amount, and against the Broadway Bank for the residue; and that execution against the Broadway Bank for any amount except such residue be stayed until such execution against Allen, Stephens & Co. is returned unsatisfied, or until it otherwise appears that the plaintiff is unable to collect from Allen, Stephens & Co. the amount for which they are so decreed to be liable. In regard to costs, the decree will provide as above directed. The parties will be heard on the question as to a provision for a dividend on the claim of Allen, Stephens & Co.

NATIONAL EXCHANGE BANK V. HILLS.*

Taxation of shares — remedy for illegal — constitutional law.

A State statute, independent of and designed as a substitute for all other provisions for taxation, which permits any debtor, assessed upon personal property, to deduct the amount of his debts from the valuation of all his personal property, including money capital, except bank shares, is wholly unconstitutional and invalid as to National bank shares, and affords no authority for making any assessment upon such shares; and an injunction to restrain the enforcement of such tax will issue at the suit of a bank the shares of whose capital are thus illegally assessed against the shareholders.

(Circuit Court, Northern District of New York.)

SUIT to restrain the collection of a tax against shareholders. The opinion states the case. The provisions of the State statute in question will be found, *ante*, 57.

Matthew Hale, for complainant.

R. W. Peckham, for defendant.

WALLACE, J. The complainant has filed its bill in equity to enjoin the collection of a tax assessed in 1879 against its shareholders by the board of assessors of the city of Albany, the defendants being the officers of the city charged with the collection of taxes.

The bill proceeds upon the theory, first, that the assessment against the shareholders is void, because there was no legal authority for making any assessment; second, if not void, for want of original authority, it was based upon a rule of unequal valuation of different classes of property, intentionally adopted by the assessors in order to discriminate unjustly against shareholders of National banks, and was excessive, and as to the excess the collection of the tax should be restrained.

Both of these theories are grounded on that section of the act of Congress relating to National Banking Associations, which restricts taxation of shares in such associations imposed by the authority of the State within which the association is located, by

* Not yet reported.

providing "that the taxation shall not be at a greater rate than is assessed upon other money capital in the hands of individual citizens of such States."

The assessment complained of was made under color of an act of the Legislature of this State, passed April 23, 1866, entitled "An act authorizing the taxation of banks and surplus funds of savings banks." This act, as construed by the highest court of the State, in view of previous legislation and upon consideration of the various provisions and directions of the act itself, established a system of taxation for bank shares "peculiar to itself and independent of the general system of taxation in existence in the State," and upon this ground it was decided by the Court of Appeals (*Dolan v. People*, 36 N. Y. 59; Thomp. N. B. Cas. 684), that a bank shareholder who had been assessed upon the value of his shares was not entitled to any deduction on account of his debts, although the general laws of the State and the local law relating to assessments in the city of Albany contained provisions whereby in the assessment of personal property a deduction should be made for the debts owing by the person assessed.

So far as this act contravenes the law of Congress by imposing a tax upon shares of National Banking Associations, at a greater rate than is assessed upon other moneyed capital in the hands of individuals, concededly it cannot stand, but the point in controversy is whether an assessment made under the act is void for want of power in the assessors to make any assessment, or is only erroneous when made without granting the deductions allowed by the general laws of the State. If the assessors have no power to make a valid assessment of the shares *eo nomine* or against the owners for the value of their shares, the whole foundation of the taxation fails. On the other hand, if the assessors have authority to assess under the statute in question or under the other statutes of the State, then the inquiry arises, whether the assessment is erroneous, because the proper deductions were denied, or because a rule of valuation which discriminated unfairly against the stockholders was adopted; and this being so, whether there is any remedy except in a direct proceeding to review the assessment. Obviously if the first theory of the complainant is sound,

it is of no importance whether the shareholders of the complainant were, in fact, owing debts which would have been deducted from the assessment or not, because there was no jurisdiction for any action on the part of the assessors.

In the view of the case which I am constrained to adopt, it will not be necessary to examine the second theory which has been alluded to, a theory which, upon the facts, involves several difficult and doubtful questions of law; but I am of the opinion that the only authority for the assessment is to be found in the statute of 1866, and that act, as respects the taxation of shares in National banking associations, is radically vicious and can have no operation. This conclusion is predicated upon the decision in *Dolan v. People*, and upon *People v. Weaver*, 100 U. S. 539; *ante*, 57.

The construction given to the act in *Dolan v. The People* is explicitly to the effect that the act is intended to establish a system of taxation for bank capital peculiar to itself, and independent of the general system of taxation in existence in the State. It is there declared that "the act was intended as a substitute for the then existing mode of assessing and taxing that portion of the property of the State invested in the capital of these moneyed corporations." If this is the correct exposition of the statutory intent, it cannot be questioned that the act must stand or fall upon its own provisions, and cannot be sustained by treating it as a part of the general system of taxation, and reading it as though it contained these provisions found in other parts of the system which would secure to the holder of bank shares the same exemptions and privileges allowed to the holders of other money capital. Accepting this as the true construction of the law, it was held by the Supreme Court of the United States, in *People v. Weaver*, that the operation of the laws to impose upon a citizen of the State, whose money was invested in bank shares, a greater rate of taxation than was imposed upon those whose capital was otherwise invested, in violation of the prohibition of the law of Congress. It was only necessary to decide in the particular case that the person assessed was entitled to the deduction from his assessment on account of his debts, which he

claimed, and the question was not before the court whether or not the whole assessment was void; but the opinion proceeds upon the ground, and expressly declares that the statute of the State is in conflict with the act of Congress, because it does not permit such deduction on account of debts.

It would seem that these discussions are conclusive to the effect that the act of 1876 is to be regarded as though it in terms declared not only that the shares in National banking associations should be taxed at a rate, and upon an assessment prohibited by the act of Congress, but also as though it declared that no other tax should be imposed on account of such shares, because being a substitute for the existing provisions of the general laws as respects the taxation of capital represented by bank shares, it is by implication a repeal of those provisions.

The decisions of the courts of a State in the construction of a State statute, where no Federal question is involved, are conclusive upon the courts of the United States, and the construction which was given by the Court of Appeals to this statute has been recognized as controlling and final by the Supreme Court of the United States.

But it is urged on behalf of the defendants, that the Court of Appeals may reconsider its views in the light of the decision of the Supreme Court, and the consequences which ensue from that decision. Undoubtedly these consequences may be serious, as shareholders of National banks may in some instances escape the payment of taxes upon their personal property to the extent such property is invested in bank shares. This consideration, as well as those graver ones which lead courts to seek for some construction of a law, which will uphold it if possible, would appeal with great force to any tribunal before which the question originally presented might come. But this court must take the law as it finds it, and must accept the decision of the Court of Appeals as authoritative. This court cannot substitute in the place of that decision its own judgment as to what the Court of Appeals might possibly decide upon a reconsideration of the questions involved.

Besides the decision of the Court of Appeals, reference should

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be made to the act of Legislature of June 26, 1880, as a legislative exposition of the act of 1866. The later act is clearly intended as a substitute for the act of 1866, and does not vary essentially in its provisions from the earlier act except that it expressly declares that in the assessment of bank shares each stockholder shall be allowed all the deductions and exemptions allowed by law, in assessing the value of other taxable personal property owned by individual citizens of the State, and the assessment and taxation shall not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this State. This act was wholly unnecessary, if as is contended for the defendants the original act should be construed as though the provisions of the general laws relating to reductions were incorporated in it.

It is much to be regretted that the conclusions thus reached may lead to the loss of a large sum in taxes justly due from tax payers to the municipality represented by the defendants. But the result must be attributed to ill-considered legislation, which by attempting to impose an exceptional and unjust rule of taxation upon shareholders of National banks has so far overshot its mark as to exonerate them from any taxation.

It is insisted for the defendants that the complainant is not the proper party to resist the payment of the tax, and that the stockholders are the only persons who can complain; and it is also insisted that an action to enjoin the collection of the tax is not the appropriate remedy.

These objections may properly be considered together. The general rule that a bill in equity will not lie to restrain the collection of a tax is familiar, but the right to the relief sought here rests upon the ground that it is necessary to prevent a multiplicity of suits likely to arise, owing to the peculiar position which the complainant occupies toward its shareholders on the one side, and the defendants on the other.

The act of 1866 makes it the duty of every banking association to retain so much of any dividend or dividends belonging to its stockholders as may be necessary to pay any taxes assessed in pursuance of that act, and the case shows that most of the share-

holders of the complainant paid to the complainant the amount severally assessed upon their shares for the tax in controversy, or allowed the amount of the assessments to be retained from their dividends, but that prior to the commencement of this action a considerable number of the shareholders filed their protest and forbade the complainant to pay over the amounts or to retain them for the purpose of paying the tax. The statute imposes a duty on the complainant in the nature of a trust, but which it can only discharge at the peril of being subjected to numerous suits at the hands of those whose money it retains. As is said in the similar case of *Cummings v. National Bank*, 101 U. S. 157; *ante*, 74, "it holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties pertaining to it. To prevent multiplicity of suits, equity may interfere."

It is true the statute in terms does not require the bank to pay the taxes assessed against its shareholders, but by necessary implication it authorizes the bank to do so, and thus brings the case precisely within the facts of *Cummings v. National Bank*. That case must be regarded as a decisive authority against the objections urged here, to the right of the complainant to the relief demanded.

A decree is ordered for the complainant.

ADDENDA.

NATIONAL BANK V. UNITED STATES.

(101 U. S. 1.)

Taxation of circulating medium — constitutionality.

The provision of the National Bank Act that National banks, and State banks, bankers and associations shall be taxed on the amount of town, city or municipal corporation notes paid out by them is constitutional.

ERROR to the Circuit Court of the United States for the eastern district of Arkansas. Suit by the United States to recover from the Merchants' National Bank of Little Rock, Arkansas, ten per cent on notes of the city of Little Rock, paid out by the bank as part of its circulation. The plaintiff had judgment below.

B. C. Brown, for plaintiff in error.

Solicitor-General, contra.

WAITE, C. J. The only question presented is as to the constitutionality of section 3413 of the Revised Statutes, the objection being that the tax is virtually laid upon an instrumentality of the State of Arkansas.

We think this case comes strictly within the principles settled in *Veazie Bank v. Fenno*, 8 Wall. 533; Thomp. N. B. Cas. 22, where it was distinctly held that the tax imposed by that section on National and State banks for paying out the notes of individuals or State banks used for circulation was not unconstitutional. The reason is thus stated by Mr. Chief Justice CHASE: "Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit

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of it to the people by appropriate legislation. To this end Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile," p. 549.

The tax thus laid is not on the obligation, but on its use in a particular way. As against the United States, a State municipality has no right to put its notes in circulation as money. It may execute its obligations, but cannot, against the will of Congress, make them money. The tax is on the notes paid out, that is, made use of as a circulating medium. Such a use is against the policy of the United States. Therefore the banker who helps to keep up the use by paying them out, that is, employing them as the equivalent of money in discharging his obligations, is taxed for what he does. The taxation is no doubt intended to destroy the use; but that, as has just been seen, Congress has the power to do.

Judgment affirmed.

NATIONAL COMMERCIAL BANK OF MOBILE V. MAYOR, ETC., OF
MOBILE.

(62 Ala. 284.)

Taxation — remedy for illegal.

The assessment by a municipal corporation of a tax upon the shares of a National bank in gross, or upon its capital stock, is void,* but the remedy is at law, and not by injunction, although the municipal corporation is insolvent.

BILL to enjoin the collection of a tax by the city of Mobile. It was alleged that the city was insolvent. The opinion states other facts. The chancellor dismissed the bill.

* See *Sumter Co. v. National Bank of Gainesville*, post.

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J. Little Smith and John F. Taylor, for appellant.

William G. Jones, contra.

MANNING, J. The main question — one that has been ably and strenuously argued in this case — concerns the validity of a taxation by the city of Mobile against appellant, the National Commercial Bank of Mobile, of a certain *per centum* upon the amount (\$350,000) of its capital; appellant being a “National banking association,” under the act of Congress “authorizing, providing for the establishment of, and regulating such institutions.”

It is through them, called generally “National banks,” that the “National currency,” payment of which is guaranteed by the general government, is emitted and kept in circulation. The notes of which this currency consists, designed, engraved, stamped and numbered with the purpose of preventing them from being counterfeited, are obtained from the government by the National banks, upon their depositing, in exchange for them and as security for their payment, interest-bearing bonds of the United States, to an amount exceeding by ten *per centum* that of the notes received. The amount of the bonds thus used and deposited by any bank must not be less than one-third of its capital, and is generally a much larger proportion, often the whole of it; and those bonds being securities of the United States for money borrowed are not subject to State or municipal taxation.

The statutes relating to these banks, after enacting that “in lieu of taxes to the United States, *every association* shall pay to the treasurer, * * * * a duty of one-half of one *per centum* each half year upon the average amount of its notes in circulation, and a duty of one-quarter of one *per centum* each half year upon the average amount of its deposits, and a duty of one-quarter of one per centum each half year on the average amount of its capital stock *beyond the amount invested in United States bonds*,” — further provide, that “nothing herein shall prevent all the *shares* in any association from being included in the valuation of the personal property of the *owner or holder of such shares*, in assessing taxes imposed by the authority of the State within which the association is located; but the legislature in any State may

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determine and direct the manner and place of taxing all *the shares* of National banking associations located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that *the shares* of any National banking association *owned by non-residents* of any State, shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of *associations* from either State, county or municipal taxes to the same extent, according to its value, as other real property is taxed." Rev. Stat. U. S., §§ 5214, 5219.

Upon a careful reading of this law, it will be observed that these *associations*, the National banks, are themselves, in their corporate capacity, expressly declared to be subject to impositions for the public revenue, in two cases only: first, in favor of the United States, by the duties to be paid to the Treasurer, from which it seems intended that the amount they have invested in United States bonds shall be exempt; and secondly, in favor of each State upon their real property therein, according to its value. Their liability to this tax upon their real estate was probably conceded in deference to the opinion hereinafter cited, of the Supreme Court, delivered by Chief Justice MARSHALL, concerning the sovereign rights remaining in the States over the property within their jurisdiction.

The statute does not, in words, inhibit a State from imposing a tax against the National banks within its borders, on their capital, or any thing else belonging to them; but by expressly recognizing the right of State taxation against them, upon their real estate only, and by providing for such tax against the *shareholders* of the banks upon the value of the shares they may respectively own, it seems to be implied that this is as far as a State may lawfully go in subjecting these associations to such burdens, and the only manner in which they can be imposed. Is this a correct conclusion?

The answer to that question, it seems to me, begins in the great case of *McCulloch v. Maryland*, decided sixty years ago, 4 Wheat. 316-437. An act of that State made it highly penal for

officers of any branch bank, that might be established therein without its authority, to issue notes of such bank to circulate as money, except upon stamped paper to be furnished by the State, and for which it charged a heavy tax; and McCulloch, cashier of a branch in Baltimore of the Bank of the United States, was prosecuted for issuing there the notes of this bank in violation of that law. Webster, Pinckney, and other lawyers of the greatest ability, argued the cause; and the Supreme Court of the United States, through Chief Justice MARSHALL, after a very able discussion, and laying down a rule, with the argument on which it was founded, for determining the subjects that are within the reach of State taxation, declared it to be the unanimous opinion of the court, "that the States have no power, by taxation or otherwise, to retard, impede or burden, or in any manner control the operations of the constitutional laws of Congress to carry into execution the powers of the general government;" and because this branch of the Bank of the United States was an agency or means authorized by a constitutional law, through which that government was executing those powers, the act of Maryland laying the tax was pronounced to be null and void. The chief justice added: "This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax, paid by the real property of the bank in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution in common with other property of the same description throughout the State."

The principles of this opinion have been ever since adhered to by the Supreme Court — and have been several times applied in other celebrated cases. In *Osborn v. U. S. Bank*, 9 Wheat. 738, it was, upon an elaborate reargument of the subject, explained why the capacity to issue its own notes as a currency, and do the business of a bank of discount, deposit and circulation, faculties which might be exercised by individuals or corporations wholly unconnected with public affairs — was considered essential to the vitality and usefulness of the Bank of the United States as a government fiscal agent, and why it therefore was not taxable

in respect of the advantage it derived from the employment of those faculties. In *Weston v. City of Charleston*, 2 Peters, 449, a municipal tax upon stock certificates for money obtained by loan, issued by the United States to individuals, and in their hands, was held to be unconstitutional, because it impeded the government in the exercise of its power to borrow money. In 1862, the same principle was reaffirmed and applied in *Bank of Commerce v. City of New York*, 2 Black, 620, in respect to a tax of that city upon the capital of the State banks situated therein; the capital of each being largely invested, in some instances almost entirely, in United States bonds. Again, in the "*Bank-tax* case," 2 Wall. 200, it was decided that a tax of the State of New York on the banks there, "on a *valuation equal* to the amount of their capital stock paid in, or secured to be paid in," was a tax on their property, and that so far as it consisted of stocks of the Federal government the law laying the tax was void. And in *Farmers' National Bank v. Dearing*, 91 U. S. 29; Thomp. N. B. Cas. 117, the Supreme Court say: "The National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them, Congress is the sole judge. Being such means, brought into existence for this purpose, and intended to be so employed, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. * * * Against the National will, 'the States have no power, by taxation or otherwise, to retard, impede or burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.' "

Whatever evil, therefore, in the overthrow of State policies, especially in regard to usury, may be apprehended as possible from the unrestrained exercise of such power by the Federal government, it appears to be very positively settled by the Supreme Court that a State has no independent authority of its own over the National banks within its borders, as they are now endowed;

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they being created and employed by Congress as instruments and agencies in the administration of public affairs; and that inasmuch as by taxing them directly, their efficiency and usefulness might be impaired, the several States have no power to lay any burden of this kind upon them, except so far as Congress has made them liable to such jurisdiction, or property belonging to them was previously subject thereto.

What that body has enacted, in this regard, is, that "all the *shares* in any association" may be "included in the valuation of the personal property of the owner or holder of such shares in assessing taxes imposed by the authority of the State within which the association is located," and that "the legislature in any State may determine and direct the manner and place of taxing all *the shares*," subject to two restrictions not affecting the argument. And the act further makes it the duty of the president and cashier of every banking association to "cause to be kept, at all times, a full and correct list of *the names and residences of all the shareholders* in the association, and of the *number of shares* held by each, in the office where the business is transacted," and subject to the inspection of "the officers *authorized to assess taxes* under State authority — during business hours."

But the city of Mobile made the assessment now in question, not against any of the shareholders, but against the bank itself, upon all "complainant's shares in gross, composing its capital stock" (see paragraph two of answer); or as the exhibits to the bill show, upon its "capital, \$350,000." And it is urged that, inasmuch as the capital is composed of the shares, and the shareholders constitute the corporation, a tax upon the capital, or all the shares of the capital in gross, against the corporation itself, is in legal effect the same as a tax against the shareholders severally upon their respective shares. And it seems, indeed, as if there should be practically little difference between the two. Yet Congress, by providing that all the shares of the capital may be included in the valuation of the personal property of their owners or holders for State taxation, and by requiring to this end written or printed lists to be kept for inspection by the tax officers of the names, places of residence and number of shares of these share-

holders, appears carefully to have avoided subjecting the banks themselves to State taxation of their capital.

The reasons for this probably were — first, a desire to prevent any such interference with these instrumentalities for administration, as the old Bank of the United States encountered; and, secondly, views of the subject similar to those on which the decision in *Van Allen v. Assessors*, 3 Wall. 573; Thomp. N. B. Cas. 1, is founded. It is there held that the capital of a National bank belongs to it only in its corporate capacity, not to the stockholders, and that as it consists largely, and often wholly, in United States bonds, by taxing the capital as such, these bonds would necessarily be taxed; which cannot in any case be permitted. But the shares, it was further held, of the several shareholders, which the law declares may be included in the valuation of their personal property in the assessment of taxes imposed by or under State authority — although their value may be largely influenced by the new use which the banks were thereby authorized to make of the bonds — did not consist of the bonds. Said Mr. Justice NELSON, for a majority of the court: “The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal, and within the powers conferred upon it by the charter and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own.” “The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital,” etc. “This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to State taxation under the limitations prescribed.”

And as a reason why this taxation should not be regarded as a tax upon the bonds in which the capital of the bank was invested, and why no deduction should be made on account of them, the learned judge referred to the privileges and powers conferred by the act — “founded upon a new use and application of these government bonds — especially the privilege of issuing notes to circulate in the community as money, to the amount of *ninety*

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per centum of the bonds deposited with the treasurer; thereby nearly doubling their amount for all the operations and business purposes of the banks." Wherefore, it was held that the tax was properly authorized upon the shares, in respect of these new privileges, and the advantages they conferred upon the shareholder in the increased value he derived therefrom. It might also have been added, that the capital of a bank is generally a fixed sum which does not change; while the shares thereof, in the hands of the shareholders, vary in value according to the condition of its affairs; and the rule now generally enforced by constitutional and legislative enactments is that all taxes shall be in proportion to the value of the subject on account of which they are assessed. In *People v. Commissioners*, 4 Wall. 244; Thomp. N. B. Cas. 9, the views presented in the above leading case were reaffirmed; also in *Bradley v. People*, id. 459; Thomp. N. B. Cas. 19, and in other cases since.

According, therefore, to the terms of the act of Congress and the decisions of the Supreme Court of the United States, the taxes brought into discussion in this cause were not assessed in conformity with or by authority of law.

The defects, however, and errors were rather in the mode of proceeding than in the matter of right. There is no doubt that the shares of the stock in National banks may be lawfully included in the valuation of the personal property of the owners thereof, in assessing taxes imposed by authority of the State, and are as such liable according to their value, to the county and municipal, as well as to State taxes, in the counties, cities and towns in which the banks are respectively located, provided such taxes shall not be heavier than those imposed upon other moneyed capital. Moreover, the president and cashier of every such bank are required to have made out and kept, at all times, in its office for the transaction of business, a list of its shareholders, their places of residence, and of the number of their shares respectively; and it may be made the duty of every such bank to pay for its stockholders the tax legally assessed against their respective shares, whether the stockholders reside in the State of Alabama or not. Contestations upon these points have been made time and again, sometimes by

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the banks and sometimes by the shareholders, to avoid this liability. But it is established by repeated adjudications, and ought to be considered definitely settled. See upon the subject, *Van Allen v. Assessor, supra*; *People v. Commissioners, supra*; *National Bank v. Commonwealth*, 9 Wall. 353; Thomp. N. B. Cas. 34 (an interesting case); *Tappan v. Merchants' National Bank*, 19 Wall. 491; Thomp. N. B. Cas. 100; *People v. Commissioners of Assessment*, 94 U. S. 415; *Waite v. Dowley*, id. 527; Thomp. N. B. Cas. 137; *Adams v. Nashville*, 95 U. S. 19; Thomp. N. B. Cas. 148; *McIver v. Robinson*, 53 Ala. 456; Thomp. N. B. Cas. 372.

It is insisted, however, on behalf of the city of Mobile, that even if the taxes in controversy are illegal, or illegally assessed, complainant's remedy is not in a court of equity by injunction. This is certainly in accordance with our decisions heretofore. The allegations of insolvency against a municipal corporation, which rarely has much property of its own subject to execution, have not the same force as they would have against an individual or private trading corporation. Bodies politic of this public character, established for the local government of communities, raise their revenues, as a State does, by taxation of the people and property within their jurisdiction. Obstructions to the exercise of this right and refusal to pay taxes are often the chief cause of municipal embarrassments. The averments of the insolvency of the city cannot be regarded as affording a sufficient reason why a Court of Chancery should take jurisdiction of a case of this nature, for which there were ample remedies at law, including especially proceedings by *certiorari*.

Let the decree of the chancellor, therefore, be affirmed.

BRICKELL, C. J. I concur in affirming the decree of the chancellor, upon the ground that a court of equity has not jurisdiction to enjoin the collection of the tax. I do not concur in much that was said in reference to the taxation of the shares in National banks.

SUMTER COUNTY V. NATIONAL BANK OF GAINESVILLE.

(62 Ala. 464.)

Taxation — action against bank for tax on stock.

An assessment upon the capital stock of a National bank in gross is invalid, and a provision that the same "shall be paid by each such association for the shareholders thereof," when dependent upon such invalid provision, and incapable of independent enforcement, is also inoperative, and imposes no duty on the bank to pay such tax.

ACTION for taxes by Sumter county against a National bank. The opinion states the facts. The defendant had judgment below.

STONE, J. The present complaint contains many counts, but in each one the taxes claimed are averred to have been assessed upon the capital stock of the defendant corporation, by an aggregate or gross assessment. In the case of *National Bank of Mobile v. Mayor, etc., of Mobile* (*ante*, p. 440), we ruled that such assessment is irregular and invalid, and that the capital stock of a National bank cannot be the subject of State taxation. See that case, 62 Ala. 284. In the counts of the amended complaint, it is averred that the defendant — the National bank — "according to the statute in such cases made and provided, rendered to the tax assessor of Sumter county a list of property liable to taxation, and included in said list one hundred thousand dollars capital stock, the same being the aggregate of all the shares of the stockholders in said bank, the taxes upon which were required, by the statute in such cases made and provided, to be paid by the defendant for the shareholders thereof." These counts then aver the amount or rate of taxes that was levied by the court of county commissioners for county purposes, and continue: "And by virtue of the premises, the defendant became liable to pay the plaintiff the sum of * * * dollars for taxes as aforesaid; that amount being the amount of taxes due the plaintiff on the aggregate amount of said shares of stock." The

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Circuit Court sustained a demurrer to the complaint, and the plaintiff brings the case here by appeal.

It is very true as stated in the case of *National Commercial Bank v. Mayor, etc., supra*, that the distinction between the capital stock of a bank and the shares of stock in the bank is somewhat technical; the former being but the aggregation of the latter. But it is the difference between the several parts and the whole; between the tributaries and the congregated volume which forms the river; between the several partners and the aggregated partnership; between an artificial entity, called a corporation, having a local habitation and a name, capable of suing and being sued, and which may survive all the shareholders of any given period, and the several owners of the shares, who are commonly real persons, and who may undergo constant change, by transfer or death, without disturbing or affecting the continuance or identity of the corporation. They are, in law, different persons. The policy of denying to the State legislatures the privilege and power to tax the capital stock of National banks, while expressly granting them the right to tax the shares in such corporations, was a question for the Congress of the United States, not for us. Ever since the decision in the case of *McCulloch v. Maryland*, 4 Wheat. 316, it has been steadily maintained that such banking institutions are not subject to State assessment for taxes, except as the Congress may grant the privilege. Hence, it is a question of power conferred, not of policy. That the capital stock of banks cannot be made a subject of State taxation, see *Bank Tax* case, 2 Wall. 220; *Van Allen v. Assessors*, 3 Wall. 573; Thomp. N. B. Cas. 1; *People v. Commissioners*, 4 Wall. 248; Thomp. N. B. Cas. 130; *Commercial National Bank v. Mayor, etc. (ante, p. 440)*. Speaking of the distinction between the capital stock of a bank and the shares in such capital stock, Justice NELSON, in *Van Allen v. Assessors*, 3 Wall. 583-4; Thomp. N. B. Cas. 1, says: "The tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as

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absolutely as a private individual can deal with his own. * * * The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property, held by the shareholder, like any other property that may belong to him. It is this interest which the act of Congress has left subject to taxation by the States, under the limitations prescribed." For an able discussion of these questions, see Burroughs on Taxation, 120-128.

The act of Congress, which authorizes the States to levy and collect taxes on the shares in National banks, is in the following language, Revised Statutes of the United States, section 5219: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by the authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of National banking associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in any city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed." We think it is difficult to misunderstand the various provisions of this statute. It clearly confers on the several States the power and authority to levy upon *the several shareholders* in a National bank located in the State, a tax, subject only to the two named restrictions, and clothes the legislature of the State with power to determine and direct the manner and place of taxing the shares of all such banking associations located in their respective States.

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It also requires that the shares of non-resident shareholders shall be taxed in the city or town where the bank is located, and not elsewhere. Under this statute it has been rightly held that the State in which the National bank is located has the exclusive right to derive revenue from the shares of such bank, no matter where the shareholders may have their domicile. It is also settled that the legislature of a State may, by law, make it the duty of the bank to pay taxes thus levied on the shares of the shareholders. *National Bank v. Commonwealth*, 9 Wall. 355; Thomp. N. B. Cas. 34.

It is contended for appellant that the case last cited affirms the validity of the levy and assessment in this case, and shows that the present action is well brought. According to our construction of the language of the court in that case, it is perfectly reconcilable with the language of this court in *National Commercial Bank v. Mayor, etc., supra*, and with all the other cases cited. The tax levied in that case by the legislature of Kentucky was in the following language: "On bank stock, or stock in any moneyed corporation of loan or discount, fifty cents on each share thereof equal to one hundred dollars, or on each one hundred dollars thereof, owned by individuals, corporations or societies." This was clearly a levy of the tax on *the shares* of the bank, and not on the capital stock. The statute further provided that "the cashier of a bank, whose stock is taxed, shall, on the first day of July in each year, pay into the treasury the amount of tax due." Speaking of the section levying the tax, first copied, the Supreme Court of the United States, by a unanimous opinion affirming the judgment of the Supreme Court of Kentucky, said: "We entertain no doubt that this provision was intended to tax the shares of the stockholders, and that if no other provision had been made, the amount of the tax would have been primarily collectible of the individual or corporation owning such shares, in the same manner as other taxes are collectible from individuals. It is clear that it is the shares owned or held by individuals in the banking corporation which are to be taxed, and the measure of the tax is fifty cents per share of one hundred dollars. These shares may, in the market, be worth a great deal more, or a great

deal less than their par or nominal value, as its capital may have been increased or diminished by gains or losses, but the tax is the same in each case. This shows that it is the shares which are intended to be taxed, and not the cash or other actual capital of the bank." In that case the distinction was carefully drawn between the shares of stock in a bank, and the capital stock. The State had demanded payment of the tax from the bank, and being refused, suit was brought, and a recovery had. The case is an authority for these propositions. First, that National banks, having stock invested in United States bonds, are not subject to taxation on their capital stock under State authority. Second, that shares in such banks are subject to taxation against the shareholders. Third, that when the State statute authorizes it, the bank may be compelled by suit to pay the taxes so assessed upon the shares; and fourth, in the absence of such legislative direction, such tax is collectible of the shareholders, in the same manner as other taxes are collected from individuals.

It results from what we have said that the act "to restrict the power of taxation," etc., approved February 23, 1875 (Pamph. Acts, 49), so far as it may be supposed to relate to the capital stock of National banks, is inoperative.

Should the tax be levied on the *shares* of the stock of the bank, as we have shown it may be, then the only authority for requiring the bank to pay such assessment is found in subdivision 7, section 369 of the Code of 1876. That section is composed of three paragraphs separated by semi-colons. The first and third of those paragraphs are clearly unconstitutional under the principles declared in *Mayor, etc., v. Stonewall Insurance Company*, 53 Ala. 570. We need not re-state the argument. The second clause refers to the first, is dependent on it, and cannot have an independent operation, the first being swept away. It relates to the tax authorized by the first paragraph, and to nothing else. Having shown that tax to be unconstitutionally levied, the second clause has no field of operation. Its language is "the same," that is, the tax of seventy-five cents on each share of one hundred dollars of the capital stock of every National banking association, to be in lieu of all taxation, State, county and municipal, on

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such shares, "to be paid by each such association for the shareholders thereof." There is, then, no statute which requires the National banking associations to pay the State tax on the shares of such associations. It follows that such tax can only be assessed under subdivision 13 of section 362, Code of 1876, and can be collected only as taxes against other individuals are collected. This would work an affirmance of the judgment of the Circuit Court, even if the tax had been assessed against the several shares.

Judgment affirmed.

BRICKELL, C. J., dissenting.

ATLANTIC NATIONAL BANK V. HARRIS.

(118 Mass. 147.)

Change of State bank to National bank — action by latter on cause of action accruing to former.

A State bank paid its president money to reimburse him for money which he falsely represented he had paid to its creditor. The State bank was afterward changed to a National bank, and the creditor recovered judgment against it for his debt. *Held*, that it could maintain an action against the president for money had and received, although the State statute provided that the State bank should be continued a body corporate for three years for the purpose of prosecuting and defending suits, closing its concerns, and conveying its property.

ACTION for money had and received. The opinion states the facts.

H. C. Hutchins, for defendant.

C. A. Welch, for plaintiff.

ENDICOTT, J. It appears, from the agreed statement of facts, that the Atlantic Bank, a corporation under the laws of this Commonwealth, was previously to 1863 the owner of certain real estate in St. Louis, which it had taken for debt. The defendant was then president of the bank, and in its behalf he employed one

Pierce, who was at that time in his personal service upon a salary to go to St. Louis and take charge of, manage, and improve the real estate. Pierce was engaged in that duty for twenty months. The defendant, in January, 1864, presented to the bank a bill of \$1,506.67, for money paid by him to Pierce for his services; and on August 3, 1864, the bank paid the defendant that sum, and he receipted the bill. The defendant had not then paid the money to Pierce, as represented in his bill, and never paid him.

In December, 1864, the Atlantic Bank was changed and converted into a National banking association, under the name of the Atlantic National Bank of Boston, the plaintiff in this action, and the defendant became president of the association. It is admitted that the defendant took all the property and paid all the debts of the State bank.

On April 20, 1869, Pierce brought an action against the plaintiff for his services so rendered the Atlantic Bank, and recovered their value, in the same sum which had been paid the defendant upon his representation that he had paid Pierce. It is admitted that the plaintiff was liable for this debt, that it was rightfully recovered, and that neither the Atlantic Bank, nor the plaintiff, nor any officer of either institution, except the defendant, had any notice of Pierce's claim, or that he had not been paid, or of the plaintiff's claim upon the defendant, until Pierce's action was brought.

The defendant contends upon these facts, that the plaintiff cannot maintain this action in its own name; and if it can, that the action is barred by the statute of limitations. The presiding judge in the court below held and found that the action could be maintained, and was not barred by the statute, to which the defendant excepts. [Omitting immaterial matter.]

1. The Atlantic Bank, being indebted to Pierce, could at the time of its conversion have maintained an action against the defendant for the money wrongfully obtained by him. That the plaintiff upon its organization became liable to Pierce for this debt of the Atlantic Bank is conceded, and the first question is, whether the right of action against the defendant passed to the plaintiff

with the other property of the Atlantic Bank, and whether it can maintain an action thereon in its own name.

Under the statutes of the United States of 1863, ch. 58, § 61, and of 1864, ch. 106, § 44, any State bank could become or be converted into a National banking association. In such case, the articles of association, and the certificate of organization required by those statutes, were to be executed by a majority of the directors of the State bank; and such certificate must declare that the owners of two-thirds of the capital stock of the bank had authorized the directors to make such certificate, and to change and convert the bank into a National association. The majority of the directors are also empowered to execute all papers and to do whatever is necessary to complete the organization, and they are to continue to act as directors of the National association, until others are chosen and qualified under the provisions of the act. The par value of the shares, and also the amount of the capital stock, may remain the same, provided the capital shall not be less than that prescribed by the acts of Congress.

To enable banks in this Commonwealth to become banking associations under the laws of the United States, and to surrender their charters, the legislature enacted the statute of 1863, ch. 244, and the statute of 1864, ch. 190. Both acts were in force when the plaintiff corporation was organized. These acts contain many provisions not material to this inquiry; but it is provided that when the stockholders have voted to become a National association, and the directors have procured the authority of the owners of two-thirds of the capital stock to make the certificate required by the laws of the United States, notice thereof shall be published, and also sent to each stockholder, and thereupon the bank commissioners shall determine and certify the market value of the shares, at the date of the certificate, to the directors, and any stockholder who has not given his authority to the directors, and who desires to surrender his certificate of stock, shall be paid by the bank the market value of the stock. Stat. 1863, ch. 244, §§ 2, 3; Stat. 1864, ch. 190, § 4. Security is also required to be given by the bank for the redemption by the association of bills issued before its conversion, and in certain contingencies and

under certain regulations the association may be authorized by the bank commissioners to reissue and continue in circulation such outstanding bills for a limited time. Stat. 1863, ch. 244, § 6; Stat. 1864, ch. 190, § 1; and while such bills are continued in circulation they are liable to taxation. Stat. 1864, ch. 190, § 3. See, also, subsequent acts in regard to the redemption, circulation, and taxation of bills. Stat. 1865, chs. 163, 185; 1866, ch. 223; 1868, ch. 210.

Where a bank has complied with the requirements necessary to convert it into a National association, and proper certificates thereof have been given to the Governor and Council, notice to that effect shall be published, and the bank shall be deemed to have surrendered its charter, subject to the provision that it shall be continued a body corporate for the term of three years, for the purpose of prosecuting and defending suits, and to enable it to close its concerns and convey its property, but not for the purpose of continuing the business for which it was established. Stat. 1863, ch. 244, §§ 1, 8. This provision has been somewhat modified by the acts already cited and by the Stat. of 1869, ch. 437; and when a bank had not conveyed its real estate within the three years, the legislature has passed a special act to enable it to do so. Stat. 1869, ch. 295; 1870, chs. 15, 32, 38, 42.

It appears that under the statutes of the United States and the Stat. of 1863 and 1864 of this Commonwealth, the Atlantic Bank was in December, 1864, changed and converted into a National banking association, under the name and style borne by the plaintiff, and that all the articles, certificates and papers necessary to complete its organization were executed, that all publications required were made, and that all the property of the State bank was duly transferred, to which proceedings the defendant, in his capacity of president, was a party.

The evident intent of the statutes thus enacted by the United States and by this Commonwealth was to enable a State bank voluntarily to become a new organization under the laws and jurisdiction of the United States, by complying with the necessary formalities, and by the transfer of its stock, its property of every description and all its liabilities. The rights of any stockholder

declining to give authority to make the charge are carefully guarded. On the execution of the necessary papers and on the approval by the proper officers, the directors of the State bank became the directors of the National bank, the capital stock and the stockholders of the old bank became the stock and stockholders of the new, together with the right to all the property not specially excepted, and the obligation to pay all indebtedness not otherwise provided for. No other assignment was necessary to pass the personal property; the completion of the conversion contemplated by the statutes carried with it the assignment and transfer of all personal property and rights of action, and the consequent liability to pay debts.

The provision of the statute of 1863, ch. 244, § 1, that the bank shall be continued a body corporate for the term of three years for certain purposes, does not necessarily conflict with this interpretation.

There are many reasons why such a provision was necessary. The bank was required to give security for the redemption of its bills, it was liable to be taxed for them while in circulation, it alone could make the necessary conveyances of real estate, it might continue to hold property not transferred to the new organization; and for the prosecution of all suits pending, and all suits which must necessarily be brought against it, or by it in its own name, the provision was essential. By continuing the existence of banks, thus converted, as bodies corporate, the Commonwealth was enabled to regulate those matters peculiarly within its province to provide for, as appeared by the numerous statutes subsequently passed in relation to the redemption, circulation and taxation of bank bills.

By the transfer, therefore, of all the property of the Atlantic Bank to the plaintiff on the completion of its organization, this chose in action passed to the plaintiff to the same extent as if formally and in terms assigned.

[Omitting other matters.]

Commonwealth v. Manufacturers and Mechanics' Bank of Philadelphia.

COMMONWEALTH V. MANUFACTURERS AND MECHANICS' BANK OF
PHILADELPHIA.

(2 Pearson's Decisions, 386.)

Taxation of State bank in transition to a National bank.

While a State bank is changing to a National bank, and before the requirements of the State statute are fully complied with, it is subject to State taxation.

(Pennsylvania Common Pleas.)

THE opinion states the case.

By the COURT. This is a question of taxation and presents a single point. When did the bank cease to be a State, and become solely a National institution? It is very clear that as a National bank the defendant could not be taxed in the method attempted in the present case. This is not only settled by the Federal courts in numerous decisions, but by the Supreme Court of our own State in the case of *City of Pittsburgh v. First National Bank*, 5 P. F. Smith, 45; Thomp. N. B. Cas. 936, though the stockholders of such institutions may be taxed for their stock at the place where the bank is located, but not at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such State. This by virtue of the provisions in the 41st section of the act of Congress, without which the States could have imposed no tax whatever on a National bank, or any other means adopted for carrying on the Federal government. *Commonwealth v. Girard Bank*, 1 Pearson, 366.

It may be considered in the light of an income tax levied on the individual citizen, and not in that of a tax imposed on a National bank. By the act of June 3d, 1864, the Congress of the United States devised a system of banking, expected to become universal in all the States and by taxation designed to drive all other paper currency out of existence. The people were authorized by their own action to form banking companies, with a certain amount of capital paid in, and to receive the notes pre-

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pared at the treasury and secured by government bonds for circulation. These banks were intended to be entirely independent of the State control, and by the 41st section of the act exempt from all taxation, except a charge of one-half of one per centum every six months on the average amount of their notes in circulation. The States were, by the same section, permitted to tax the stock in the hands of the holders in the manner before stated. By the 44th section of the same act State banks are authorized to become National associations in the manner therein prescribed, and on making proper proof thereof the Comptroller of the Currency shall give to such associations a certificate showing that the provisions of the act have been complied with, and conferring on it the power to commence the business of banking under it, after which the association is to have the same powers and privileges, and be subject to the same duties, responsibilities and rules in all respects as are prescribed in the act for other associations formed under it and held and regarded as a National association. All of this the case concedes has been done by the defendant. The Mechanics and Manufacturers' Bank held a charter under the laws of Pennsylvania at the time of this congressional enactment. Its charter was in full force, had some time to run, and it was subject to our laws, and owed certain duties and responsibilities to this State, which it is very manifest the legislature considered could not be severed or dispensed with without its sanction; therefore the statute of August 22d, 1864, was enacted. This in its title shows that it was passed to enable the banks of the Commonwealth to become associations for the purpose of banking under the laws of the United States. The first section declares that those banks authorized under and incorporated by authority of law shall be decided to have surrendered their charters if they shall have complied with the provisions of this act; but their corporate powers may be continued for three years to enable them to wind up their business.

The third section requires those State banks having specie certificates of loans to the Commonwealth "to surrender the same, and such as have not are to pay the full amount of accrued profits, surplus fund, contingent fund, or profit and loss of such bank,

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under what name or account the same may be classed and arranged, as if such accrued profits had been divided on the day for declaring dividends by such bank next before the first day of January, aforesaid." The tenth section provides: "The bank tax imposed by the laws of this Commonwealth shall be paid by such bank up to the date of its becoming such association in proportion to the time since the next preceding payment therefor." The eleventh section declares in substance that when a bank furnishes to the Auditor-General satisfactory evidence that all of the requirements of the act have been complied with, and that it has become a banking association under the laws of the United States, the Auditor-General shall certify the facts to the Governor, who shall cause notice thereof to be published and the charter of the bank shall *thereupon* be deemed to be surrendered, etc. We take it for granted that this bank held no specie certificates, as referred to in the third section of the act of 1864, but owed taxes under that act, which were not paid until the 15th day of December, 1864. It is also conceded that until that day no evidence was laid before the Auditor-General that the defendant had become a banking institution under the laws of the United States. We are inclined to think that neither this nor any other bank which had accepted its charter under the laws of Pennsylvania could, by its own mere volition, sever its connection with the State, and surrender its charter without the consent and against the will of the State authorities, unless where it went into liquidation under the acts of assembly, but we are very certain that it could not do so and at the same time avail itself of the privilege conferred by the first section of the act of 1864, to take three years to wind up the business. After the abandonment of its charter it would have no means of affecting its debts by an action at law. This corporation doubtless availed itself of that provision of the act though it is not so stated in the case, which is an important omission. The bank might be both a National and State institution at the same time, and although in the former capacity it could not be taxed by this Commonwealth, yet it could in the latter so long as it remained under and enjoyed the protection of the State laws. Although the intention was doubtless to sever all connec-

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tion with the State government and become solely a National institution, yet while in the transition state, it was subject to taxation which could continue to be imposed until the conditions of the statute were complied with. I am far from considering that the mere failure to pay the tax due on the 1st of November furnished any ground for refusing to recognize the defendant as a National bank. The non-payment of the money could be compensated by the collection of interest thereon, which is the proper penalty, not the imposition of an additional tax. But the omission to furnish the evidence to the Auditor-General that it had complied with the provisions of the act of assembly, as required by the 11th section thereof, and had become a banking association under the laws of the United States, is fatal to its defense. The Auditor-General had no official information that it had become a National bank which he could certify to the Governor so as to enable him to cause proclamation thereof to be made through the newspapers, as required by law. It is only after all of that is done that this institution ceases to be a State bank. The court must direct judgment to be entered in favor of the plaintiff for the amount specified, with interest thereon, as agreed in the case stated.

GERMAN NATIONAL BANK V. MEADOWCROFT.

(North Western Reporter, 1; Illinois Supplement, 759.)

Bank acting as warehouseman — ultra vires — estoppel.

A National bank, which has wrongfully converted to its own use the property of another, is estopped from denying its liability to account therefor upon the ground that it received and held the property in carrying on the business of a warehouseman, outside the powers conferred by its charter.

(Illinois Supreme Court.)

ACTION for conversion of grain. The opinion states the point. Error to appellate court.

Tenney & Flower, for plaintiff.

Barker, Buel & Barker, for defendant.

WALKER, C. J. [Omitting other points.] It is insisted for the bank that its charter does not authorize it to engage in or carry on the business of warehousemen ; that its charter only authorizes it to do a banking business, and the receipt, storage, and otherwise handling grain as a warehouseman is *ultra vires*, and it cannot be held liable. The jury, by their verdict, and the appellate court, by affirming the judgment of the Circuit Court, have found that the bank has converted this grain to its own use ; that it has appropriated appellee's property and deprived him of it to the amount of the verdict, and that this was wrongfully done. And shall the bank be heard to say that, although it has appellee's property which it refuses to surrender to him, and has converted it to the use of the bank, and because it was obtained by the performance of acts not authorized by the charter, the bank will hold it and refuse to account for it or its proceeds? Such cannot be the law. Suppose a person to make a special deposit in a bank of a sum of money, and the envelope should be broken, the money taken and placed into the funds of the bank, and its profit account credited to the amount, and it should be paid out in the course of its business, could the bank, when sued, escape liability by saying that the bank is not authorized to receive special deposits for safe-keeping only, and the act was *ultra vires*? We presume no one would contend for such a defense, and it may be asked in principle, how does the case at bar differ from the one supposed? In such a case the bank would have received money and appropriated it, to which it had no claim, nor should it be permitted to hold it because it was wrongfully obtained.

The question is not whether the bank was acting under and in conformity to the provisions of its charter in receiving and forwarding grain, but whether the bank has wrongfully converted appellee's property to its own use. If, as the jury have found, the bank has, then it does not matter whether the wrong was perpetrated while the bank was in the pursuit of its legitimate business, or was acting against the provisions of its charter. The wrong to appellee is the same in the one case as in the other. It can be no defense to say the bank obtained and converted appellee's property contrary to the provisions of its charter. The

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wrong is the same, and it cannot matter in what manner the wrong was perpetrated, as the liability is the same. It is the wrong and not the manner in which it occurred that we have to consider. It is not a defense for the bank to say, we received and converted the grain and held the money without claim of right, but as when we converted the property we were acting beyond the limits of our charter, you cannot recover. The bank committed the wrong and is liable. Perceiving no error in this record, the judgment of the appellate court is affirmed.

Judgment affirmed.

NATIONAL BANK ACT,

AND OTHER

LAWS RELATING TO NATIONAL BANKS.

CHAPTER ONE.

THE COMPTROLLER OF THE CURRENCY.

[The numbers in parentheses refer to the Revised Statutes.]

Bureau of Comptroller of the Currency established. — 1. (SEC. 324.) There shall be in the department of the treasury a bureau charged with the execution of all laws passed by Congress relating to the issue and regulation of a National currency secured by United States bonds; the chief officer of which bureau shall be called the Comptroller of the Currency, and shall perform his duties under the general direction of the Secretary of the Treasury.

Comptroller of the Currency, appointment, term of office, etc. — 2. (SEC. 325.) The Comptroller of the Currency shall be appointed by the President, on the recommendation of the Secretary of the Treasury, by and with the advice and consent of the Senate, and shall hold his office for the term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate; and he shall be entitled to a salary of five thousand dollars a year.

Oath and bond of Comptroller. — 3. (SEC. 326.) The Comptroller of the Currency shall, within fifteen days from the time of notice of his appointment, take and subscribe the oath of office, and he shall give to the United States a bond in the penalty of one hundred thousand dollars, with not less than two responsible

sureties, to be approved by the Secretary of the Treasury, conditioned for the faithful discharge of the duties of his office.

Deputy Comptroller, appointment, duties, etc. — oath and bond of Deputy. — 4. (SEC. 327.) There shall be in the bureau of the Comptroller of the Currency, a Deputy Comptroller of the Currency, to be appointed by the Secretary, who shall be entitled to a salary of two thousand five hundred dollars a year, and who shall possess the power and perform the duties attached by law to the office of Comptroller during a vacancy in the office or during the absence or inability of the Comptroller. The Deputy Comptroller shall also take the oath of office prescribed by the Constitution and laws of the United States, and shall give a like bond in the penalty of fifty thousand dollars.

Clerks. — 5. (SEC. 328.) The Comptroller of the Currency shall employ, from time to time, the necessary clerks, to be appointed and classified by the Secretary of the Treasury, to discharge such duties as the Comptroller shall direct.

Interest in National banks prohibited. — 6. (SEC. 329.) It shall not be lawful for the Comptroller or the Deputy Comptroller of the Currency, either directly or indirectly, to be interested in any association issuing National currency under the laws of the United States.

Seal of office. — 7. (SEC. 330.) The seal devised by the Comptroller of the Currency for his office, and approved by the Secretary of the Treasury, shall continue to be the seal of office of the Comptroller, and may be renewed when necessary. A description of the seal, with an impression thereof, and a certificate of approval of the Secretary of the Treasury, shall be filed in the office of the Secretary of State.

As amended February 18, 1875.

Rooms, vaults, furniture, etc., for Bureau. — 8. (SEC. 331.) There shall be assigned from time to time, to the Comptroller of the Currency, by the Secretary of the Treasury, suitable rooms in the Treasury building for conducting the business of the Currency Bureau, containing safe and secure fire-proof vaults, in which the Comptroller shall deposit and safely keep all the plates not necessarily in the possession of engravers or printers, and other valuable things belonging to his department; and the Comptroller

shall from time to time furnish the necessary furniture, stationery, fuel, lights, and other proper conveniences for the transaction of the business of his office.

Comptroller to examine banks in District of Columbia.—

9. (SEC. 332.) The Comptroller of the Currency, in addition to the powers conferred upon him by law for the examination of National banks, is further authorized, whenever he may deem it useful, to cause examination to be made into the condition of any bank in the District of Columbia organized under act of Congress. The Comptroller, at his discretion, may report to Congress the results of such examination. The expense necessarily incurred in any such examination shall be paid out of any appropriation made by Congress for special bank examinations.

Annual report.— 10. (SEC.* 333.) The Comptroller of the Currency shall make an annual report to Congress, at the commencement of its session, exhibiting—

Condition of National associations.— First. A summary of the state and condition of every association from which reports have been received the preceding year, at the several dates to which such reports refer, with an abstract of the whole amount of banking capital returned by them, of the whole amount of their debts and liabilities, the amount of circulating notes outstanding, and the total amount of means and resources, specifying the amount of lawful money held by them at the times of their several returns, and such other information in relation to such associations as, in his judgment, may be useful.

Closed associations.— Second. A statement of the associations whose business has been closed during the year, with the amount of their circulation redeemed and the amount outstanding.

Amendments to banking laws.— Third. Any amendment to the laws relative to banking by which the system may be improved, and the security of the holders of its notes and other creditors may be increased.

Condition of State banks and savings banks.— Fourth. A

* For various sections, from 330 to 335, see pp. 519-521.

For sections 3410 to 3424, see pp. 509-513.

For section 3701, see p. 511.

See act of February 18, 1875, correcting Revised Statutes.

statement exhibiting, under appropriate heads, the resources and liabilities and condition of the banks, banking companies and savings banks organized under the laws of the several States and Territories; such information to be obtained by the Comptroller from the reports made by such banks, banking companies and savings banks to the legislatures or officers of the different States and Territories, and, where such reports cannot be obtained, the deficiency to be supplied from such other authentic sources as may be available.

Clerks, and expenses of bureau.—Fifth. The names and compensation of the clerks employed by him, and the whole amount of the expenses of the Banking Department during the year.

When report may be printed.—11. (SEC. 3811.) When the annual report of the Comptroller of the Currency upon the National banks and banks under State and Territorial laws is completed, or while it is in process of completion, if thereby the business may be sooner dispatched, the work of printing shall be commenced, under the superintendence of the Secretary, and the whole shall be printed and ready for delivery on or before the first day of December next after the close of the year to which the report relates.

As amended February 18, 1875.

CHAPTER TWO.

ORGANIZATION AND POWERS OF NATIONAL BANKS.

Formation of National banking associations — articles of association.—12. (SEC. 5133.) Associations for carrying on the business of banking under this title may be formed by any number of natural persons, not less in any case than five. They shall enter into articles of association, which shall specify in general terms the object for which the association is formed, and may contain any other provisions, not inconsistent with law, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. These articles shall be signed by the persons uniting to form the association, and a copy of them shall

be forwarded to the Comptroller of the Currency, to be filed and preserved in his office.

Organization certificate.— 13. (SEC. 5134.) The persons uniting to form such an association shall, under their hands, make an organization certificate, which shall specifically state :

Name of association.— First. The name assumed by such association ; which name shall be subject to the approval of the Comptroller of the Currency.

Place of business.— Second. The place where its operations of discount and deposit are to be carried on, designating the State, Territory or district, and the particular county and city, town or village.

Capital stock.— Third. The amount of capital stock and the number of shares into which the same is to be divided.

Shareholders.— Fourth. The names and places of residence of the shareholders, and the number of shares held by each of them.

Ante, 159.

Object of certificate.— Fifth. The fact that the certificate is made to enable such persons to avail themselves of the advantages of this title.

Acknowledgment of organization certificate.— 14. (SEC. 5135.) The organization certificate shall be acknowledged before a judge of some court of record, or notary public ; and shall be, together with the acknowledgment thereof, authenticated by the seal of such court or notary, transmitted to the Comptroller of the Currency, who shall record and carefully preserve the same in his office.

Corporate powers of associations.— 15. (SEC. 5136.) Upon duly making and filing articles of association and an organization certificate, the association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power —

² Abb. U. S. 416.

Seal.— First. To adopt and use a corporate seal.

Succession.— Second. To have succession for the period of twenty years from its organization, unless it is sooner dissolved

according to the provisions of its articles of association, or by the act of its shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law.

Contracts.—Third. To make contracts.

Suits.—Fourth. To sue and be sued, complain and defend, in any court of law and [or] equity, as fully as natural persons.

Thomp. N. B. Cas. 162.

Appointment of officers.—Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

Thomp. N. B. Cas. 755, 765.

By-laws.—Sixth. To prescribe, by its board of directors, by-laws not inconsistent with law, regulating the manner in which its stock shall be transferred, its directors elected or appointed, its officers appointed, its property transferred, its general business conducted, and the privileges granted to it by law exercised and enjoyed.

Incidental powers.—Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title.

Thomp. N. B. Cas. 124, 128, 169, 264, 314, 317, 333, 379, 466, 486, 533, 724, 854, 637, 590, 715, 728, 794, 824, 836, 864, 875, 882, 906; ante, 13, 99, 238, 264, 296, 319, 337, 373, 375, 462.

When may commence business.—But no association shall transact any business except such as is incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking.

Thomp. N. B. Cas. 145, 612, 623.

Power to hold real property.—16. (SEC. 5137.) A National

banking association may purchase, hold, and convey real estate for the following purposes, and for no others :

Thomp. N. B. Cas. 284, 285, 480, 486, 488, 490, 516, 647, 854, 888, 618, 652, 745, 828, 888; *ante*, 12, 222, 224, 227, 228, 267, 278, 280, 293, 300, 311, 424, 426.

First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts due to it.

Limitation as to mortgages, etc.—But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years.

Minimum capital required.—17. (Sec. 5138.) No association shall be organized under this title with a less capital than one hundred thousand dollars; except that banks with a capital of not less than fifty thousand dollars may, with the approval of the Secretary of the Treasury, be organized in any place the population of which does not exceed six thousand inhabitants. No association shall be organized in a city the population of which exceeds fifty thousand persons with a less capital than two hundred thousand dollars.

Value and transfer of shares of stock, rights and liabilities of persons holding shares by transfer.—18. (Sec. 5139.) The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies, or security of the existing creditors of the association shall be impaired.

Van Allen v. Assessors, 3 Wall. 573; *Thomp. N. B. Cas.* 881, 406, 471, 554; *ante*, 144, 146, 180, 188.

When capital stock must be paid in and certified.—19. (SEC. 5140.) At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least ten per centum each, on the whole amount of the capital, as frequently as one installment at the end of each succeeding month from the time it shall be authorized by the Comptroller of the Currency to commence business; and the payment of each installment shall be certified to the Comptroller, under oath, by the president or cashier of the association.

Proceedings if shareholder fails to pay installments, capital to be restored if reduced below minimum, or receiver appointed.—20. (SEC. * 5141.) Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture; and if not sold, it shall be cancelled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions

*For sections 5142 to 5167, see pages 474-483.

of section fifty-two hundred and thirty-four, to close up the business of the association.

Ante, 185.

Comptroller to determine if association is entitled to commence business — certificate of officers and directors.—21. (SEC. 5168.) Whenever a certificate is transmitted to the Comptroller of the Currency, as provided in this title, and the association transmitting the same notifies the Comptroller that at least fifty per centum of its capital stock has been duly paid in, and that such association has complied with all the provisions of this title required to be complied with before an association shall be authorized to commence the business of banking, the Comptroller shall examine into the condition of such association, ascertain especially the amount of money paid in on account of its capital, the name and place of residence of each of its directors, and the amount of the capital stock of which each is the owner in good faith, and generally whether such association has complied with all the provisions of this title required to entitle it to engage in the business of banking; and shall cause to be made and attested by the oaths of a majority of the directors, and by the president or cashier of the association, a statement of all the facts necessary to enable the Comptroller to determine whether the association is lawfully entitled to commence business of banking.

Thomp. N. B. Cas. 895.

Certificate of authority to commence business, when to be issued — when certificate of authority may be withheld.—22. (SEC. 5169.) If upon a careful examination of the facts so reported, and of any other facts which may come to the knowledge of the Comptroller, whether by means of a special commission appointed by him for the purpose of inquiring into the condition of such association, or otherwise, it appears that such association is lawfully entitled to commence the business of banking, the Comptroller shall give to such association a certificate, under his hand and official seal, that such association has complied with all the provisions required to be complied with before commencing the business of banking, and that such association is authorized to commence such business. But the Comptroller may withhold from an association his certificate authorizing the commence-

ment of business, whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this title.

Thomp. N. B. Cas. 145, 612, 632, 724; *ante*, 233.

Publication of certificate.—23. (SEC. 5170.) The association shall cause the certificate issued under the preceding section to be published in some newspaper printed in the city or county where the association is located, for at least sixty days next after the issuing thereof; or, if no newspaper is published in such city or county, then in the newspaper published nearest thereto.

Increase of capital stock.—24. (SEC. 5142.) Any association formed under this title may, by its articles of association, provide for an increase of its capital from time to time, as may be deemed expedient, subject to the limitations of this title. But the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency; and no increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.

Thomp. N. B. Cas. 808.

Reduction of capital stock.—25. (SEC. 5143.) Any association formed under this title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this title to authorize the formation of associations; but no such reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained.

Thomp. N. B. Cas. 804, *ante*, 341.

Rights of shareholders to vote at elections — proxies. 26. (SEC. 5144.) In all elections of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. Share-

holders may vote by proxies duly authorized in writing; but no officer, clerk, teller or book-keeper of such association shall act as proxy; and no shareholder whose liability is past due and unpaid shall be allowed to vote.

Number and election of directors — term of office. — 27. (Sec. 5145.) The affairs of each association shall be managed by not less than five directors, who shall be elected by the shareholders at a meeting to be held at any time before the association is authorized by the Comptroller of the Currency to commence the business of banking; and afterward at meetings to be held on such day in January of each year as is specified therefor in the articles of association. The directors shall hold office for one year, and until their successors are elected and have qualified.

Qualifications of directors. — 28. (Sec. 5146.) Every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the State, Territory or district in which the association is located for at least one year immediately preceding their election, and must be residents therein during their continuance in office. Every director must own, in his own right, at least ten shares of the capital stock of the association of which he is a director. Any director who ceases to be the owner of ten shares of the stock, or who becomes in any other manner disqualified, shall thereby vacate his place.

See ante, 285.

Oath required from directors. — 29. (Sec. 5147.) Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this title, and that he is the owner, in good faith, and in his own right, of the number of shares of stock required by this title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office.

See ante, 285.

Vacancies, how filled.—30. (Sec. 5148.) Any vacancy in the board shall be filled by appointment by the remaining directors, and any director so appointed shall hold his place until the next election.

Proceedings where no election is held on the proper day.—31. (Sec. 5149.) If, from any cause, an election of directors is not made at the time appointed, the association shall not for that cause be dissolved, but an election may be held on any subsequent day, thirty days' notice thereof in all cases having been given in a newspaper published in the city, town or county in which the association is located; and if no newspaper is published in such city, town or county, such notice shall be published in a newspaper published nearest thereto. If the articles of association do not fix the day on which the election shall be held, or if no election is held on the day fixed, the day for the election shall be designated by the board of directors in their by-laws, or otherwise; or if the directors fail to fix the day, shareholders representing two-thirds of the shares may do so.

The president must be a director.—32. (Sec. 5150.) One of the directors, to be chosen by the board, shall be the president of the board.

Individual liability of shareholders — exception as to individual liability — receiver may be appointed for deficiency in surplus.—33. (Sec. 5151.) The shareholders of every National banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under State laws, having not less than five millions of dollars of capital actually paid in, and a surplus of twenty per centum on hand, both to be determined by the Comptroller of Currency, shall be liable only to the amount invested in their shares; and such surplus of twenty per centum shall be kept undiminished, and be in addition to the surplus provided for in this title; and if at any time there is a deficiency in such surplus of twenty per centum, such association shall not pay any dividends to its shareholders until the deficiency

is made good; and, in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of chapter four of this title.

Thomp. N. B. Cas. 331, 406, 471, 554; *ante*, 112-160.

Executors, trustees, etc., not personally liable.— 34. (SEC. 5152.) Persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.

Thomp. N. B. Cas. 331; *ante*, 115-160.

Duties and liabilities of associations when designated as depositaries of moneys.— 35. (SEC. 5153.) All National banking associations, designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the government; and they shall perform all such reasonable duties, as depositaries of public moneys and financial agents of the government, as may be required of them. The Secretary of the Treasury shall require the associations thus designated to give satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government. And every association so designated as receiver or depositary of the public money shall take and receive at par all of the National currency bills, by whatever association issued, which have been paid into the government for internal revenue, or for loans or stocks.

Thomp. N. B. Cas. 363.

Organization of State banks as National banking associations — mode of procedure — shares and powers of State bank after conversion — to have the same rights, liabilities, etc., as other National associations — minimum capital.— 36. (SEC. 5154.) Any bank incorporated by special law, or any banking institution organized under a general law of any State

may become a National association under this title by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate may be executed by a majority of the directors of the bank or banking institution; and the certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the bank or banking institution into a National association. A majority of the directors, after executing the articles of association and organization certificate, shall have power to execute all other papers, and to do whatever may be required to make its organization perfect and complete as a National association. The shares of any such bank may continue to be for the same amount each as they were before the conversion, and the directors may continue to be the directors of the association until others are elected or appointed, in accordance with the provisions of this chapter; and any State bank which is a stockholder in any other bank, by authority of State laws, may continue to hold its stock, although either bank, or both, may be organized under and have accepted the provisions of this title. When the Comptroller of the Currency has given to such association a certificate, under his hand and official seal, that the provisions of this title have been complied with, and that it is authorized to commence the business of banking, the association shall have the same powers and privileges, and shall be subject to the same duties, responsibilities and rules, in all respects, as are prescribed for other associations originally organized as National banking associations, and shall be held and regarded as such an association. But no such association shall have a less capital than the amount prescribed for associations organized under this title.

Thomp. N. B. Cas. 145, 539, 625, 645, 802, 896; *ante*, 245, 454, 459.

State banks having branches.—37. (SEC. 5155.) It shall be lawful for any bank or banking association, organized under State laws, and having branches, the capital being joint and assigned to and used by the mother bank and branches in definite proportions, to become a National banking association in conformity with existing laws, and to retain and keep in operation its branches, or such one or more of them as it may elect to retain; the amount of the circulation redeemable at the mother bank, and each branch,

to be regulated by the amount of capital assigned to and used by each.

Reservation of rights of associations organized under act of 1863.—38. (SEC. 5156.) Nothing in this title shall affect any appointments made, acts done, or proceedings had or commenced prior to the third day of June, eighteen hundred and sixty-four, in or toward the organization of any National banking association under the act of February twenty-five, eighteen hundred and sixty-three; but all associations which, on the third day of June, eighteen hundred and sixty-four, were organized, or commenced to be organized, under that act, shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities and restrictions imposed by this title, notwithstanding all the steps prescribed by this title for the organization of associations were not pursued, if such associations were duly organized under that act.

CHAPTER THREE.

OBTAINING AND ISSUING CIRCULATING NOTES.

What associations are governed by chapters two, three and four of this title.—39. (SEC. 5157.) The provisions of chapters two, three and four of this title, which are expressed without restrictive words, as applying to "National banking associations," or to "associations," apply to all associations organized to carry on the business of banking under any act of Congress.

United States bonds defined.—40. (SEC. 5158.) The term "United States bonds," as used throughout this chapter, shall be construed to mean registered bonds of the United States.

U. S. bonds to be deposited before commencing business.—41. (SEC. 5159.) Every association, after having complied with the provisions of this title, preliminary to the commencement of the banking business, and before it shall be authorized to commence banking business under this title, shall transfer and deliver to the Treasurer of the United States any United States registered bonds, bearing interest, to an amount not less than thirty thousand dollars and not less than one-third of the capital stock paid in. Such bonds shall be received by the Treasurer upon

deposit, and shall be by him safely kept in his office until they shall be otherwise disposed of in pursuance of the provisions of this title.

See act of June 20, 1874, § 4.

Bonds to be increased upon increase of capital. May be diminished upon reduction of capital.— 42. (Sec. 5160.) The deposits of bonds made by each association shall be increased as its capital may be paid up or increased, so that every association shall at all times have on deposit with the Treasurer registered United States bonds to the amount of at least one-third of its capital stock actually paid in. And any association that may desire to reduce its capital or to close up its business and dissolve its organization, may take up its bonds upon returning to the Comptroller its circulating notes in the proportion hereinafter required, or may take up any excess of bonds beyond one-third of its capital stock, and upon which no circulating notes have been delivered.

Ibid.

Exchange of coupon for registered bonds.— 43. (Sec. 5161.) To facilitate a compliance with the two preceding sections, the Secretary of the Treasury is authorized to receive from any association, and cancel any United States coupon bonds, and to issue in lieu thereof registered bonds of like amount, bearing a like rate of interest, and having the same time to run.

Transfer of bonds to and by Treasurer.— 44. (Sec. 5162.) All transfers of United States bonds made by any association under the provisions of this title shall be made to the Treasurer of the United States in trust for the association, with a memorandum written or printed on each bond, and signed by the cashier or some other officer of the association making the deposit. A receipt shall be given to the association by the Comptroller of the Currency, or by a clerk appointed by him for that purpose, stating that the bond is held in trust for the association on whose behalf the transfer is made, and as security for the redemption and payment of any circulating notes that have been or may be delivered to such association. No assignment or transfer of any such bond by the Treasurer shall be deemed valid unless countersigned by the Comptroller of the Currency.

Registry of transfers.— 45. (Sec. 5163.) The Comptroller

of the Currency shall keep in his office a book in which he shall cause to be entered, immediately upon countersigning it, every transfer or assignment by the Treasurer of any bonds belonging to a National banking association presented for his signature. He shall state in such entry the name of the association from whose accounts the transfer is made, the name of the party to whom it is made, and the par value of the bonds transferred.

Notice of transfer to be given to association.— 46. (Sec. 5164.) The Comptroller of the Currency shall, immediately upon countersigning and entering any transfer or assignment by the Treasurer, of any bonds belonging to a National banking association, advise by mail the association from whose accounts the transfer is made, of the kind and numerical designation of the bonds, and the amount thereof so transferred.

Comptroller to have access to bonds, and to books of Treasurer. Treasurer to have access to books of Comptroller.— 47. (Sec. 5165.) The Comptroller of the Currency shall have at all times, during office hours, access to the books of the Treasurer of the United States for the purpose of ascertaining the correctness of any transfer or assignment of the bonds deposited by an association, presented to the Comptroller to countersign; and the Treasurer shall have the like access to the book mentioned in section 5163, during office hours, to ascertain the correctness of the entries in the same; and the Comptroller shall also at all times have access to the bonds on deposit with the Treasurer to ascertain their amount and condition.

Annual examination of bonds by associations.— 48. (Sec. 5166.) Every association having bonds deposited in the office of the Treasurer of the United States shall, once or oftener in each fiscal year, examine and compare the bonds pledged by the association with the books of the Comptroller of the Currency and with the accounts of the association, and, if they are found correct, to execute to the Treasurer a certificate setting forth the different kinds and the amounts thereof, and that the same are in the possession and custody of the Treasurer at the date of the certificate. Such examination shall be made at such time or times, during the ordinary business hours, as the Treasurer and the Comptroller, respectively, may select, and may be made by an officer or agent of such asso-

ciation, duly appointed, in writing, for that purpose; and his certificate before mentioned shall be of like force and validity as if executed by the president or cashier. A duplicate of such certificate, signed by the Treasurer, shall be retained by the association.

Bonds to be held to secure circulation — interest on bonds, how collected — if bonds depreciate, deposit to be increased — exchange of bonds — return of bonds on surrender of circulation — limitation on withdrawal of bonds.— 49. (Sec.* 5167.) The bonds transferred to and deposited with the Treasurer of the United States, by any association, for the security of its circulating notes, shall be held exclusively for that purpose, until such notes are redeemed, except as provided in this title. The Comptroller of the Currency shall give to any such association powers of attorney to receive and appropriate to its own use the interest on the bonds which it has so transferred to the Treasurer; but such powers shall become inoperative whenever such association fails to redeem its circulating notes. Whenever the market or cash value of any bonds thus deposited with the Treasurer is reduced below the amount of the circulation issued for the same, the Comptroller may demand and receive the amount of such depreciation in other United States bonds at cash value, or in money, from the association, to be deposited with the Treasurer as long as such depreciation continues. And the Comptroller, upon the terms prescribed by the Secretary of the Treasury, may permit an exchange to be made of any of the bonds deposited with the Treasurer, by any association, for other bonds of the United States authorized to be received as security for circulating notes, if he is of opinion that such an exchange can be made without prejudice to the United States; and he may direct the return of any bonds to the association which transferred the same, in sums of not less than one thousand dollars, upon the surrender to him and the cancellation of a proportionate amount of such circulating notes; *provided* that the remaining bonds which shall have been transferred by the association offering to surrender circulating notes are equal to the amount required for the circulating notes not surrendered by such association, and that the amount of bonds in the

* For sections 5168 to 5170, see pp. 473-474.

hands of the Treasurer is not diminished below the amount required to be kept on deposit with him, and that there has been no failure by the association to redeem its circulating notes, nor any other violation by it of the provisions of this title, and that the market or cash value of the remaining bonds is not below the amount required for the circulation issued for the same.

See act of June 20, 1874, § 4.

Delivery of circulating notes to associations — ratio to capital of circulating notes issued.—50. (Sec. 5171.) Upon a deposit of bonds as prescribed by sections fifty-one hundred and fifty-nine and fifty-one hundred and sixty, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as hereinafter provided, equal in amount to ninety per centum of the current market value of the United States bonds so transferred and delivered, but not exceeding ninety per centum of the amount of the bonds at the par value thereof, if bearing interest at a rate not less than five per centum per annum; *provided* that the amount of circulating notes to be furnished to each association shall be in proportion to its paid-up capital, as follows, and no more:

First. To each association whose capital does not exceed five hundred thousand dollars, ninety per centum of such capital.

Second. To each association whose capital exceeds five hundred thousand dollars, but does not exceed one million of dollars, eighty per centum of such capital.

Third. To each association whose capital exceeds one million of dollars, but does not exceed three million[s] of dollars, seventy-five per centum of such capital.

Fourth. To each association whose capital exceeds three millions of dollars, sixty per centum of such capital.

Form, denominations, and printing of circulating notes.—51. (Sec. 5172.) In order to furnish suitable notes for circulation, the Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, cause plates and dies to be engraved, in the best manner to guard against counterfeiting and fraudulent alterations, and shall have printed therefrom, and numbered, such quantity of circulating notes, in blank, of the

denominations of one dollar, two dollars, three dollars, five dollars, ten dollars, twenty dollars, fifty dollars, one hundred dollars, five hundred dollars, and one thousand dollars, as may be required to supply the associations entitled to receive the same. Such notes shall express upon their face that they are secured by United States bonds, deposited with the Treasurer of the United States by the written or engraved signatures of the Treasurer and Register, and by the imprint of the seal of the Treasury; and shall also express upon their face the promise of the association receiving the same to pay on demand, attested by the signatures of the president or vice-president and cashier; and shall bear such devices and such other statements, and shall be in such form as the Secretary of the Treasury shall, by regulation, direct.

Control of plates and dies, and expenses of bureau.—52. (SEC. 5173.) The plates and special dies to be procured by the Comptroller of the Currency for the printing of such circulating notes shall remain under his control and direction, and the expenses necessarily incurred in executing the laws respecting the procuring of such notes, and all other expenses of the bureau of the currency, shall be paid out of the proceeds of the taxes or duties assessed and collected on the circulation of National banking associations under this title.

Annual examination of plates and dies, etc.—certain printing material to be destroyed.—53. (SEC. 5174.) The Comptroller of the Currency shall cause to be examined, each year, the plates, dies, but-pieces, [bed-pieces,] and other material from which the National bank circulation is printed, in whole or in part, and file in his office annually a correct list of the same. Such material as shall have been used in the printing of the notes of associations which are in liquidation, or have closed business, shall be destroyed under such regulations as shall be prescribed by the Comptroller of the Currency and approved by the Secretary of the Treasury. The expenses of any such examination or destruction shall be paid out of any appropriation made by Congress for the special examination of National banks and bank-note plates.

Issue of notes under five dollars, limited.—54. (SEC. 5175.) Not more than one-sixth part of the notes furnished to any association shall be of a less denomination than five dollars. After

specie payments are resumed no association shall be furnished with notes of a less denomination than five dollars.

Circulation of certain banks limited to \$500,000. — 55. (SEC. 5176.) No banking association organized subsequent to the twelfth day of July, eighteen hundred and seventy, shall have a circulation in excess of five hundred thousand dollars.

Aggregate amount of circulating notes. — 56. (SEC. 5177.) The aggregate amount of circulating notes issued under the act of February twenty-five, eighteen hundred and sixty-three, and under the act of June three, eighteen hundred and sixty-four, and under section one of the act of July twelve, eighteen hundred and seventy, and under this title, shall not exceed three hundred and fifty-four millions of dollars.

See act of Jan. 14, 1875, § 8.

Apportionment of circulating notes. — 57. (SEC. 5178.) One hundred and fifty millions of dollars of the entire amount of circulating notes authorized to be issued shall be apportioned to associations in the States, in the Territories, and in the District of Columbia, according to representative population. One hundred and fifty millions shall be apportioned by the Secretary of the Treasury among associations formed in the several States, in the Territories, and in the District of Columbia, having due regard to the existing banking capital, resources, and business of such States, Territories, and District. The remaining fifty-four millions shall be apportioned among associations in States and Territories having, under the apportionments above prescribed, less than their full proportion of the aggregate amount of notes authorized, which made due application for circulating notes prior to the twelfth day of July, eighteen hundred and seventy-one. Any remainder of such fifty-four millions shall be issued to banking associations applying for circulating notes in other States or Territories having less than their proportion.

Ibid.

Equalizing the distribution of circulating notes. — 58. (SEC. 5179.) In order to secure a more equitable distribution of the National banking currency, there may be issued circulating notes to banking associations organized in States and Territories having less than their proportion, and the amount of circulation

herein authorized shall, under the direction of the Secretary of the Treasury, as it may be required for this purpose, be withdrawn, as herein provided, from banking associations organized in States having more than their proportion, but the amount so withdrawn shall not exceed twenty-five million dollars: *Provided*, that no circulation shall be withdrawn under the provisions of this section until after the fifty-four millions granted in the first section of the act of July twelfth, eighteen hundred and seventy, shall have been taken up.

Ibid. See act of June 22, 1874, § 7.

Method of procedure in withdrawing excess of circulation.
Sale of bonds upon failure of association to return notes.
— 59. (SEC. 5180.) The Comptroller of the Currency shall, under the direction of the Secretary of the Treasury, make a statement showing the amount of circulation in each State and Territory, and the amount necessary to be withdrawn from each association, and shall forthwith make a requisition for such amount upon such associations, commencing with those having a circulation exceeding one million of dollars, in States having an excess of circulation, and withdrawing their circulation in excess of one million of dollars, and then proceeding proportionately with other associations having a circulation exceeding three hundred thousand dollars, in States having the largest excess of circulation, and reducing the circulation of such associations in States having the greatest proportion in excess, leaving undisturbed the associations in States having a smaller proportion, until those in greater excess have been reduced to the same grade, and continuing thus to make such reductions until the full amount of twenty-five millions has been withdrawn; and the circulation so withdrawn shall be distributed among the States and Territories having less than their proportion, so as to equalize the same. Upon failure of any association to return the amount of circulating notes so required, within one year, the Comptroller shall sell at public auction, having given twenty days' notice thereof in one daily newspaper printed in Washington and one in New York city, an amount of the bonds deposited by that association as security for its circulation, equal to the circulation required to be withdrawn from the association and not returned in compli-

ance with such requisition ; and he shall, with the proceeds, redeem so many of the notes of such association, as they come into the Treasury, as will equal the amount required and not returned ; and shall pay the balance, if any, to the association.

See act of Jan. 14, 1875, § 3.

Removal of associations from State having an excess of circulation to one having a deficiency.—60. (SEC. 5181.) Any association located in any State having more than its proportion of circulation may be removed to any State having less than its proportion of circulation, under such rules and regulations as the Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall prescribe: *Provided*, that the amount of the issue of said banks shall not be deducted from the issue of fifty-four millions mentioned in section five thousand one hundred and seventy-eight.

Ibid.

Circulating notes—when may be issued by association—for what demands shall be received.—61. (SEC. 5182.) After any association receiving circulating notes under this title has caused its promise to pay such notes on demand to be signed by the president or vice-president and cashier thereof, in such manner as to make them obligatory promissory notes, payable on demand, at its place of business, such association may issue and circulate the same as money. And the same shall be received at par in all parts of the United States in payment of taxes, excises, public lands, and all other dues to the United States, except duties on imports ; and also for all salaries and other debts and demands owing by the United States to individuals, corporations, and associations within the United States, except interest on the public debt, and in redemption of the National currency.

Issue of other notes prohibited.—62. (SEC. 5183.) No National banking association shall issue post-notes or any other notes to circulate as money than such as are authorized by the provisions of this title.

See act of Feb. 18, 1875, correcting Rev. Stat. ; Merchants' Bank v. State Bank, 10 Wall. 604.

Destroying and replacing worn-out and mutilated notes.—63. (SEC. 5184.) It shall be the duty of the Comptroller of the Currency to receive worn-out or mutilated circulating notes issued

by any banking association, and also, on due proof of the destruction of any such circulating notes, to deliver in place thereof to the association other blank circulating notes to an equal amount. Such worn-out or mutilated notes, after a memorandum has been entered in the proper books, in accordance with such regulations as may be established by the Comptroller, as well as all circulating notes which shall have been paid or surrendered to be cancelled, shall be burned to ashes in presence of four persons, one to be appointed by the Secretary of the Treasury, one by the Comptroller of the Currency, one by the Treasurer of the United States, and one by the association, under such regulations as the Secretary of the Treasury may prescribe. A certificate of such burning, signed by the parties so appointed, shall be made in the books of the Comptroller, and a duplicate thereof forwarded to the association whose notes are thus cancelled.

See act of June 23, 1874.

Organization of associations for issuing gold-notes — denominations of circulating notes, and ratio of, to bonds deposited — maximum circulation.— 64. (Sec. 5185.) Associations may be organized in the manner prescribed by this title for the purpose of issuing notes payable in gold; and upon the deposit of any United States bonds bearing interest payable in gold with the Treasurer of the United States, in the manner prescribed for other associations, it shall be lawful for the Comptroller of the Currency to issue to the association making the deposit circulating notes of different denominations, but none of them of less than five dollars, and not exceeding in amount eighty per centum of the par value of the bonds deposited, which shall express the promise of the association to pay them, upon presentation at the office at which they are issued, in gold coin of the United States, and shall be so redeemable. But no such association shall have a circulation of more than one million of dollars.

See act of January 19, 1875.

Reserve required on circulation of gold-banks — gold-notes to be received at par by all gold-banks — “lawful money,” how construed.— 65. (Sec.* 5186.) Every association organized

* For section 5187, see page 513.

under the preceding section shall at all times keep on hand not less than twenty-five per centum of its outstanding circulation, in gold or silver coin of the United States; and shall receive at par in the payment of debts the gold-notes of every other such association which at the time of such payment is redeeming its circulating notes in gold coin of the United States, and shall be subject to all the provisions of this title: *Provided*, that, in applying the same to associations organized for issuing gold-notes, the terms "lawful money" and "lawful money of the United States" shall be construed to mean gold or silver coin of the United States; and the circulation of such association shall not be within the limitation of circulation mentioned in this title.

Penalty for imitating National bank notes, etc. — 66. (Sec. 5188.) It shall not be lawful to design, engrave, print, or in any manner make or execute, or to utter, issue, distribute, circulate, or use, any business or professional card, notice, placard, circular, hand-bill, or advertisement, in the likeness or similitude of any circulating note or other obligation or security of any banking association organized or acting under the laws of the United States which has been or may be issued under this title, or any act of Congress, or to write, print, or otherwise impress upon any such note, obligation, or security any business or professional card, notice or advertisement, or any notice or advertisement of any matter or thing whatever. Every person who violates this section shall be liable to a penalty of one hundred dollars, recoverable one-half to the use of the informer.

Penalty for mutilating National bank notes, etc. — 67. (Sec. 5189.) Every person who mutilates, cuts, defaces, disfigures, or perforates with holes, or unites or cements together, or does any other thing to any bank-bill, draft, note, or other evidence of debt, issued by any National banking association, or who causes or procures the same to be done, with intent to render such bank-bill, draft, note, or other evidence of debt unfit to be reissued by said association, shall be liable to a penalty of fifty dollars, recoverable by the association.

CHAPTER FOUR.

REGULATION OF THE BANKING BUSINESS.

Place of business. — 68. (SEC. 5190.) The usual business of each National banking association shall be transacted at an office or banking-house located in the place specified in its organization certificate.

Merchants' Bank v. State Bank, 10 Wall. 604.

Requirements as to lawful money reserve — no loans or dividends to be made while reserve is below limit — receiver may be appointed for failure to make good the reserve. — 69. (SEC. 5191.) Every National banking association in either of the following cities: Albany, Baltimore, Boston, Cincinnati, Chicago, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Saint Louis, San Francisco, and Washington, shall at all times have on hand, in lawful money of the United States, an amount equal to at least twenty-five per centum of the aggregate amount of its notes in circulation and its deposits; and every other association shall at all times have on hand, in lawful money of the United States, an amount equal to at least fifteen per centum of the aggregate amount of its notes in circulation, and of its deposits. Whenever the lawful money of any association in any of the cities named shall be below the amount of twenty-five per centum of its circulation and deposits, and whenever the lawful money of any other association shall be below fifteen per centum of its circulation and deposits, such association shall not increase its liabilities by making any new loans or discounts otherwise than by discounting or purchasing bills of exchange payable at sight, nor make any dividend of its profits until the required proportion, between the aggregate amount of its outstanding notes of circulation and deposits and its lawful money of the United States, has been restored. And the Comptroller of the Currency may notify any association, whose lawful-money reserve shall be below the amount above required to be kept on hand, to make good such reserve; and if such association shall fail for thirty days thereafter so to make good its reserve of lawful money, the Comptroller may, with the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the busi-

ness of the association, as provided in section fifty-two hundred and thirty-four.

See act of June 20, 1874, § 2; *ante*, 165.

Redemption-cities, and proportion of reserve which may be kept therein — clearing-house certificates deemed lawful money. — 70. (SEC. 5192.) Three-fifths of the reserve of fifteen per centum required by the preceding section to be kept may consist of balances due to an association, available for the redemption of its circulating notes, from associations approved by the Comptroller of the Currency, organized under the act of June three, eighteen hundred and sixty-four, or under this title, and doing business in the cities of Albany, Baltimore, Boston, Charleston, Chicago, Cincinnati, Cleveland, Detroit, Louisville, Milwaukee, New Orleans, New York, Philadelphia, Pittsburgh, Richmond, Saint Louis, San Francisco, and Washington. Clearing-house certificates, representing specie or lawful money specially deposited for the purpose, of any clearing-house association, shall also be deemed to be lawful money in the possession of any association belonging to such clearing-house, holding and owning such certificate, within the preceding section.

See act of June 20, 1874, § 3.

United States certificates of deposit may be issued, and may count as reserve. — 71. (SEC. 5193.) The Secretary of the Treasury may receive United States notes on deposit, without interest, from any National banking associations, in sums of not less than ten thousand dollars, and issue certificates therefor in such form as he may prescribe, in denominations of not less than five thousand dollars, and payable on demand in United States notes at the place where the deposits were made. The notes so deposited shall not be counted as part of the lawful-money reserve of the association; but the certificates issued therefor may be counted as part of its lawful-money reserve, and may be accepted in the settlement of clearing-house balances at the places where the deposits therefor were made.

Limitation upon the issue of certificates of deposit. — 72. (SEC. 5194.) The power conferred on the Secretary of the Treasury, by the preceding section, shall not be exercised so as to create any expansion or contraction of the currency. And United States

notes for which certificates are issued under that section, or other United States notes of like amount, shall be held as special deposits in the Treasury, and used only for the redemption of such certificates.

Agents for redemption of circulating notes to be designated — receiver may be appointed for failure to redeem notes.
73. (SEC. 5195.) Each association organized in any of the cities named in section fifty-one hundred and ninety-one shall select, subject to the approval of the Comptroller of the Currency, an association in the city of New York, at which it will redeem its circulating notes at par; and may keep one-half of its lawful-money reserve in cash deposits in the city of New York. But the foregoing provision shall not apply to associations organized and located in the city of San Francisco for the purpose of issuing notes payable in gold. Each association not organized within the cities named shall select, subject to the approval of the Comptroller, an association in either of the cities named, at which it will redeem its circulating notes at par. The Comptroller shall give public notice of the names of the associations selected, at which redemptions are to be made by the respective associations, and of any change that may be made of the association at which the notes of any association are redeemed. Whenever any association fails either to make the selection or to redeem its notes as aforesaid, the Comptroller of the Currency may, upon receiving satisfactory evidence thereof, appoint a receiver in the manner provided for in section fifty-two hundred and thirty-four, to wind up its affairs. But this section shall not relieve any association from its liability to redeem its circulating notes at its own counter, at par, in lawful money on demand.

See act of June 20, 1874, § 3; *ante*, 165.

National banks to receive notes of all other National banks.
— 74. (SEC. 5196.) Every National banking association formed or existing under this title shall take and receive at par, for any debt or liability to it, any and all notes or bills issued by any lawfully organized National banking association. But this provision shall not apply to any association organized for the purpose of issuing notes payable in gold.

Limitations upon rate of interest which may be taken — the purchase or discount of bills of exchange, not usury.—

75. (SEC. 5197.) Any association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or district where the bank is located, and no more, except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. When no rate is fixed by the laws of the State, or Territory, or district, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days from which the note, bill, or other evidence of debt has to run. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight-drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

Tiffany v. National Bank of Missouri, 18 Wall. 409; *Thomp. N. B. Cas.* 90, 117, 246, 317, 350, 426, 501, 595; *ante*, 261, 354, 367.

Penalty for taking usurious interest.— 76. (SEC.* 5198.) The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred.

Thomp. N. B. Cas. 317, 330, 595, 600, 741, 793, 811, 830, 824, 833, 849, 872, 883, 890; *ante*, 20, 46, 133, 179, 211, 261, 303, 305, 331, 354, 357, 363, 365, 367, 381, 382, 395, 398, 419.

Dividends and surplus fund.— 77. (SEC. 5199.) The directors of any association may, semi-annually, declare a dividend of so much of the net profits of the association as they shall judge ex-

* For part of section 5198, see page 520, under head of Suits and Jurisdiction.

pedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half-year to its surplus fund until the same shall amount to twenty per centum of its capital stock.

Thomp. N. B. Cas. 638; *ante*, 296.

Limit of liabilities to an association of any person, firm, or corporation — the discount of bills of exchange, etc., not a loan. — 78. (SEC. 5200.) The total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including, in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. But the discount of bills of exchange drawn in good faith against actually existing values, and the discount of commercial or business paper actually owned by the person negotiating the same, shall not be considered as money borrowed.

Thomp. N. B. Cas. 150, 169, 175, 296, 488, 828, 899; *ante*, 400.

Associations not to loan upon, or purchase their own stock — receiver may be appointed for failure to sell stock. — 79. (SEC. 5201.) No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale; or in default thereof, a receiver may be appointed to close up the business of the association, according to section fifty-two hundred and thirty-four.

Bank v. Lanter, 11 Wall. 869; Thomp. N. B. Cas. 70; *Bullard v. Bank*, 18 Wall. 589; Thomp. N. B. Cas. 93, 129, 189, 273, 331, 526, 695; *ante*, 165-237.

Limit of indebtedness of association. Exceptions. — 80. (SEC. 5202.) No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Circulating notes not to be hypothecated, nor used to increase capital. — 81. (SEC. 5203.) No association shall, either directly or indirectly, pledge or hypothecate any of its notes of circulation, for the purpose of procuring money to be paid in on its capital stock, or to be used in its banking operations, or otherwise, nor shall any association use its circulating notes, or any part thereof, in any manner or form, to create or increase its capital stock.

Withdrawal of capital prohibited — dividend not to exceed net profits — bad debts defined.—82. (SEC. 5204.) No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. All debts due to any associations, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three.

Thomp. N. B. Cas. 381.

Enforcing payment of deficiency in capital stock — receiver may be appointed for failure to pay up capital.— 83. (SEC. 5205.) Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock, by assessment upon the shareholders *pro rata* for the amount

of capital stock held by each ; and the Treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the Comptroller of the Currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the Comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four.

Ante, 185.

Associations not to pay out uncurrent notes.— 84. (SEC. 5206.) No association shall at any time pay out on loans or discounts, or in purchasing drafts or bills of exchange, or in payment of deposits, or in any other mode pay or put in circulation, the notes of any bank or banking association which are not, at any such time, receivable, at par, on deposit, and in payment of debts by the association so paying out or circulating such notes ; nor shall any association knowingly pay out or put in circulation any notes issued by any bank or banking association which at the time of such paying out or putting in circulation is not redeeming its circulating notes in lawful money of the United States.

Penalty for falsely certifying checks — receiver may be appointed for false certification.— 85. (SEC. 5208.) It shall be unlawful for any officer, clerk, or agent of any National banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association at the time such check is certified, an amount of money equal to the amount specified in such check. Any check so certified by duly authorized officers shall be a good and valid obligation against the association ; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liabilities and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four.

Thomp. N. B. Cas. 47, 915.

List of shareholders to be kept, subject to inspection — list to be sent to Comptroller annually.— 86. (SEC. 5210.) The

*For sections 5207 and 5209, see pages 513-514.

president and cashier of every National banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under State authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the Comptroller of the Currency.

Thomp. N. B. Cas. 231, 656; *ante*, 157, 227.

Provisions relative to reports of associations to Comptroller.— 87. (Sec. 5211.) Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association and attested by the signature of at least three of the directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the associations at the close of business on any past day by him specified; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition.

Thomp. N. B. Cas. 499.

Reports of dividends and earnings.— 88. (Sec. 5212.) In addition to the reports required by the preceding section, each association shall report to the Comptroller of the Currency, within ten days after declaring any dividend, the amount of such divi-

dend, and the amount of net earnings in excess of such dividend. Such reports shall be attested by the oath of the president or cashier of the association.

Penalty for failure to make reports to Comptroller.— 89. (SEC. 5213.) Every association which fails to make and transmit any report required under either of the two preceding sections shall be subject to a penalty of one hundred dollars for each day after the periods, respectively, therein mentioned, that it delays to make and transmit its report. Whenever any association delays or refuses to pay the penalty herein imposed, after it has been assessed by the Comptroller of the Currency, the amount thereof may be retained by the Treasurer of the United States, upon the order of the Comptroller of the Currency, out of the interest, as it may become due to the association, on the bonds deposited with him to secure circulation. All sums of money collected for penalties under this section shall be paid into the Treasury of the United States.

Duty on circulation, deposits and capital stock.— 90. (SEC. 5214.) In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one-half of one per centum each half-year upon the average amount of its notes in circulation, and a duty of one-quarter of one per centum each half-year upon the average amount of its deposits, and a duty of one-quarter of one per centum each half-year on the average amount of its capital stock, beyond the amount invested in United States bonds.

Thomp. N. B. Cas. 453; ante, 219.

Semi-annual return of circulation, deposits and capital stock — penalty for failure to make return.— 91. (SEC. 5215.) In order to enable the Treasurer to assess the duties imposed by the preceding section, each association shall, within ten days from the first days of January and July of each year, make a return, under the oath of its president or cashier, to the Treasurer of the United States, in such form as the Treasurer may prescribe, of the average amount of its notes in circulation, and of the average amount of its deposits, and of the average amount of its capital stock, beyond the amount invested in United States bonds, for the six months next preceding the most recent first day of Jan-

uary or July. Every association which fails so to make such return shall be liable to a penalty of two hundred dollars, to be collected either out of the interest as it may become due such association on the bonds deposited with the Treasurer, or, at his option, in the manner in which penalties are to be collected of other corporations under the laws of the United States.

Method of assessment if return is not made.—92. (SEC. 5216.) Whenever any association fails to make the half-yearly return required by the preceding section, the duties to be paid by such association shall be assessed upon the amount of notes delivered to such association by the Comptroller of the Currency, and upon the highest amount of its deposits and capital stock, to be ascertained in such manner as the Treasurer may deem best.

How tax may be collected if association fails to pay.—93. (SEC. 5217.) Whenever an association fails to pay the duties imposed by the three preceding sections, the sums due may be collected in the manner provided for the collection of United States taxes from other corporations; or the Treasurer may reserve the amount out of the interest, as it may become due, on the bonds deposited with him by such defaulting association.

Thomp. N. B. Cas. 521.

Refunding excess of duties paid.—94. (SEC. 5218.) In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and found correct by the first Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury.

Provisions relative to State taxation of associations.—95. (SEC. * 5219.) Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located; but the legislature of each State may determine and direct the manner and place of taxing all the shares of National banking associations located within the State, subject only to the

* For sections 5220 to 5239, see pages 502-508.

two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State, and that the shares of any National banking association owned by non-residents of any State shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes, to the same extent, according to its value, as other real property is taxed.

Bank of Commerce v. New York City, 2 Bl. 690, *Van Allen v. The Assessors*, 3 Wall. 573; *Thomp. N. B. Cas.* 1; *People v. The Commissioners*, 4 Wall. 244; *Thomp. N. B. Cas.* 2; *Bradley v. The People*, 4 Wall. 459; *Thomp. N. B. Cas.* 459; *National Bank v. Commonwealth*, 9 Wall. 363; *Thomp. N. B. Cas.* 341; *Lyonberger v. Rouse*, 9 Wall. 465; *Thomp. N. B. Cas.* 41; *Id.* 14, 15, 24, 100, 113, 130, 148, 191, 238, 300, 323, 327, 372, 381, 390, 409, 429, 445, 460, 465, 476, 530, 571, 573, 598, 627, 629, 653, 684, 687, 715, 722, 776, 803, 803, 821, 826; *ante*, 57, 74, 83, 219, 252, 290, 343, 350, 415, 440.

Appointment, powers and duties of bank examiners.—
compensation of examiners— not to examine banks of which they are officers.— 96. (Sec. 5240.) The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall, as often as shall be deemed necessary or proper, appoint a suitable person or persons to make an examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and, in doing so, to examine any of the officers and agents thereof on oath; and shall make a full and detailed report of the condition of the association to the Comptroller. All persons appointed to be examiners of National banks not located in the redemption cities specified in section fifty-one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California and Nevada, or in the Territories, shall receive compensation for such examination as follows: For examining National banks having a capital less than one hundred thousand dollars, twenty dollars; those having a capital of one hundred thousand dollars and less than three hundred thousand dollars, twenty-five dollars; those having a capital of three hundred thousand dollars and less than four hundred thousand dollars, thirty-five dollars; those having a capital of four hundred thousand dollars and less than five hundred thousand dollars, forty dollars; those having a capital of five hundred thousand dollars and less than six hundred thousand dollars, fifty dollars; those having a capital of six hundred

thousand dollars and over, seventy-five dollars; which amounts shall be assessed by the Comptroller of the Currency upon, and paid by the respective associations so examined, and shall be in lieu of the compensation and mileage heretofore allowed for making said examinations; and persons appointed to make examination of National banks in the cities named in section fifty-one hundred and ninety-two of the Revised Statutes of the United States, or in any one of the States of Oregon, California and Nevada, or in the Territories, shall receive such compensation as may be fixed by the Secretary of the Treasury upon the recommendation of the Comptroller of the Currency; and the same shall be assessed and paid in the manner hereinbefore provided. But no person shall be appointed to examine the affairs of any banking association of which he is a director or other officer.

See act of Feb. 12, 1873, amending Rev. Stat.

Limitation of visitorial powers.—97. (SEC.* 5241.) No association shall be subject to any visitorial powers other than such as are authorized by this title, or are vested in the courts of justice.

Use of the word "National" in title, prohibited to other than National banks.—98. (SEC. 5243.) All banks not organized and transacting business under the National Currency laws, or under this title, and all persons or corporations doing the business of bankers, brokers or savings institutions, except savings banks authorized by Congress to use the word "National" as a part of their corporate name, are prohibited from using the word "National" as a portion of the name or title of such bank, corporation, firm or partnership; and any violation of this prohibition committed after the third day of September, eighteen hundred and seventy-three, shall subject the party chargeable therewith to a penalty of fifty dollars for each day during which it is committed or repeated.

*For section 5242, see page 508.

CHAPTER FIVE.

DISSOLUTION AND RECEIVERSHIP.

Voluntary liquidation.—99. (Sec. 5220.) Any association may go into liquidation and be closed by the vote of its shareholders owning two-thirds of its stock.

Notice of intention to go into liquidation.—100. (Sec. 5221.) Whenever a vote is taken to go into liquidation it shall be the duty of the board of directors to cause notice of this fact to be certified, under the seal of the association, by its president or cashier, to the Comptroller of the Currency, and publication thereof to be made for a period of two months in a newspaper published in the city of New York, and also in a newspaper published in the city or town in which the association is located, or if no newspaper is there published, then in the newspaper published nearest thereto, that the association is closing up its affairs, and notifying the holders of its notes and other creditors to present the notes and other claims against the association for payment.

Deposit of lawful money to redeem circulation.—101. (Sec. 5222.) Within six months from the date of the vote to go into liquidation, the association shall deposit with the Treasurer of the United States lawful money of the United States sufficient to redeem all its outstanding circulation. The Treasurer shall execute duplicate receipts for money thus deposited, and deliver one to the association and the other to the Comptroller of the Currency, stating the amount received by him, and the purpose for which it has been received, and the money shall be paid into the Treasury of the United States, and placed to the credit of such association upon redemption account.

Consolidating banks need not deposit lawful money.—102 (Sec. 5223.) An association which is in good faith winding up its business for the purpose of consolidating with another association shall not be required to deposit lawful money for its outstanding circulation; but its assets and liabilities shall be reported by the association with which it is in process of consolidation

Reassignment of bonds to closed banks. Notes to be redeemed at Treasury. Proceedings when association fails to deposit lawful money.—103. (Sec. 5224.) Whenever a sufficient deposit of lawful money to redeem the outstanding circulation of an association proposing to close its business has been made, the bonds deposited by the association to secure payment of its notes shall be reassigned to it, in the manner prescribed by section fifty-one hundred and sixty-two. And thereafter the association and its shareholders shall stand discharged from all liabilities upon the circulating notes, and those notes shall be redeemed at the Treasury of the United States. And if any such bank shall fail to make the deposit and take up its bonds for thirty days after the expiration of the time specified, the Comptroller of the Currency shall have power to sell the bonds pledged for the circulation of said bank, at public auction in New York city, and, after providing for the redemption and cancellation of said circulation, and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representative.

See act of Feb. 18, 1875, correcting Rev. Stat.

Destruction of redeemed notes.—104. (Sec. 5225.) Whenever the Treasurer has redeemed any of the notes of an association which has commenced to close its affairs under the six [five] preceding sections, he shall cause the notes to be mutilated and charged to the redemption account of the association; and all notes so redeemed by the Treasurer shall, every three months, be certified to and burned in the manner prescribed in section 5184.

See act of June 26, 1874.

Mode of protesting notes. One protest fee only, on same day.—105. (Sec. 5226.) Whenever any National banking association fails to redeem in the lawful money of the United States any of its circulating notes, upon demand of payment duly made during the usual hours of business, at the office of such association, or at its designated place of redemption, the holder may cause the same to be protested, in one package, by a notary public, unless the president or cashier of the association whose notes are presented for payment, or the president or cashier of the association at the place at which they are redeemable, offers to waive demand and notice of the protest, and, in pursuance of

such offer, makes, signs, and delivers to the party making such demand an admission in writing, stating the time of the demand, the amount demanded, and the fact of the non-payment thereof. The notary public, on making such protest, or upon receiving such admission, shall forthwith forward such admission or notice of protest to the Comptroller of the Currency, retaining a copy thereof. If, however, satisfactory proof is produced to the notary public that the payment of the notes demanded is restrained by order of any court of competent jurisdiction, he shall not protest the same. When the holder of any notes causes more than one note or package to be protested on the same day, he shall not receive pay for more than one protest.

See act of June 20, 1874, p. 54.

Examination by special agent after notice of protest. Foreiture of bonds.—106. (SEC. 5227.) On receiving notice that any National banking association has failed to redeem any of its circulating notes, as specified in the preceding section, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent, of whose appointment immediate notice shall be given to such association, who shall immediately proceed to ascertain whether it has refused to pay its circulating notes in the lawful money of the United States when demanded, and shall report to the Comptroller the fact so ascertained. If, from such protest, and the report so made, the Comptroller is satisfied that such association has refused to pay its circulating notes and is in default, he shall, within thirty days after he has received notice of such failure, declare the bonds deposited by such association forfeited to the United States, and they shall thereupon be so forfeited.

Association not to do business after notice of protest.—107. (SEC. 5228.) After a default on the part of an association to pay any of its circulating notes has been ascertained by the Comptroller, and notice thereof has been given by him to the association, it shall not be lawful for the association suffering the same to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits.

See act of Feb. 18, 1875, correcting Rev. Stat.; Thomp. N. B. Cas. 570, 454, 723, 575, 584, 905; ante, 68

Notice to note-holders. Redemption of notes at Treasury, and cancellation of bonds.—108. (Sec. 5229.) Immediately upon declaring the bonds of an association forfeited for non-payment of its notes, the Comptroller shall give notice in such manner as the Secretary of the Treasury shall, by general rules or otherwise, direct to the holders of the circulating notes of such association, to present them for payment at the Treasury of the United States; and the same shall be paid as presented in lawful money of the United States; whereupon the Comptroller may, in his discretion, cancel an amount of bonds pledged by such association equal at current market rates, not exceeding par, to the notes paid.

Sale of bonds at auction—the United States to have a paramount lien upon assets of associations.—109. (Sec. 5230.) Whenever the Comptroller has become satisfied, by the protest or the waiver and admission specified in section fifty-two hundred and twenty-six, or by the report provided for in section fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes, he may, instead of cancelling its bonds, cause so much of them as may be necessary to redeem its outstanding notes to be sold at public auction in the city of New York, after giving thirty days' notice of such sale to the association. For any deficiency in the proceeds of all the bonds of an association, when thus sold, to reimburse to the United States the amount expended in paying the circulating notes of the association, the United States shall have a paramount lien upon all its assets; and such deficiency shall be made good out of such assets in preference to any and all other claims whatsoever, except the necessary costs and expenses of administering the same.

Thomp. N. B. Cas. 109, 505, 218.

Sale of bonds at private sale—transfer of bonds sold.—110. (Sec. 5231.) The Comptroller may, if he deems it for the interest of the United States, sell at private sale any of the bonds of an association shown to have made default in paying its notes, and receive therefor either money or the circulating notes of the association. But no such bonds shall be sold by private sale for less than par nor for less than the market-value thereof at the time of sale; and no sales of any such bonds, either public or

private, shall be complete until the transfer of the bonds shall have been made with the formalities prescribed by sections fifty-one hundred and sixty-two, fifty-one hundred and sixty-three, and fifty-one hundred and sixty-four.

Disposition to be made of notes redeemed by Treasurer. —

111. (SEC. 5232.) The Secretary of the Treasury may, from time to time, make such regulations respecting the disposition to be made of circulating notes after presentation at the Treasury of the United States for payment, and respecting the perpetuation of the evidence of the payment thereof, as may seem to him proper.

Cancellation of notes. — 112. (SEC. 5233.) All notes of National banking associations presented at the Treasury of the United States for payment shall, on being paid, be cancelled.

See act of June 20, 1874, § 2.

Appointment and duties of receivers. — 113. (SEC. 5234.)

On becoming satisfied, as specified in sections fifty-two hundred and twenty-six and fifty-two hundred and twenty-seven, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he deems proper. Such receiver, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims, belonging to it, and, upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders. Such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings.

Kennedy v. Gibbon, 8 Wall. 498; *Thomp. N. B. Cas.* 17; *Bank of Bethel v. Palquoque Bank*, 14 Wall. 881; *Thomp. N. B. Cas.* 77; *Bank v. Kennedy*, 16 Wall. 19; *Thomp. N. B. Cas.* 87; *In re Platt. Receiver, etc.*, 1 Ben. 534; *Thomp. N. B. Cas.* 181, 167, 208, 219, 261, 221, 356, 454, 758, 792, 842; *ante*, 154, 164, 165, 306, 217.

Notice by Comptroller to creditors. — 114. (SEC. 5235.)

The Comptroller shall, upon appointing a receiver, cause notice to

be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof.

Dividends by Comptroller to creditors.—115. (SEC. 5236.) From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held.

Bank of Bethel v. Piquitoque Bank, 14 Wall. 383; *Thomp. N. B. Cas.* 97, 184, 181, 454, 774, 785, 659, *ante*, 120.

Injunction upon receivership.—116. (SEC. 5237.) When ever an association against which proceedings have been instituted on account of any alleged refusal to redeem its circulating notes as aforesaid, denies having failed to do so, it may, at any time within ten days after it has been notified of the appointment of an agent, as provided in section fifty-two hundred and twenty-seven, apply to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises; and such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after the decision of the court or finding of a jury that such association has not refused to redeem its circulating notes, when legally presented, in the lawful money of the United States, shall make an order enjoining the Comptroller, and any receiver acting under his direction, from all further proceedings on account of such alleged refusal.

See § 736, p. 51; *Thomp. N. B. Cas.* 108.

Fees and expenses of protest and receivership.—117. (SEC. 5238.) All fees for protesting the notes issued by any National banking association shall be paid by the person procuring the protest to be made, and such association shall be liable therefor; but

no part of the bonds deposited by such association shall be applied to the payment of such fees. All expenses of any preliminary or other examinations into the condition of any association shall be paid by such association. All expenses of any receivership shall be paid out of the assets of such association before distribution of the proceeds thereof.

Penalty for violation of provisions of this title—violation, how determined — liability of directors for violation.— 118. (SEC.* 5239.) If the directors of any National banking association shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation.

Thomp. N. B. Cas. 173.

Transfers, assignments, etc., after an act of insolvency, void.— 119. (SEC. 5242.) † ‡ All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any National banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void.

Thomp. N. B. Cas. 119, 192, 276, 285, 305, 331.

* For sections 5240 and 5241, see pages 500, 501.

† For first part of section 5242, see page 520, under head of Suits and Jurisdiction.

‡ For section 5243, see page 501.

CHAPTER SIX.

TAX ON UNAUTHORIZED CIRCULATION.

Capital of State bank, converted into National association.

— 120. (SEC. 3410.) The capital of any State bank or banking association which has ceased or will cease to exist, or which has been or shall be converted into a National bank, shall be assumed to be the capital as it existed immediately before such bank ceased to exist or was converted as aforesaid.

Circulation, when exempted from tax.— 121. (SEC. 3411.)

Whenever the outstanding circulation of any bank, association, corporation, company or person is reduced to the amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation; and whenever any bank which has ceased to issue notes for circulation, deposits in the Treasury of the United States, in lawful money, the amount of its outstanding circulation, to be redeemed at par, under such regulations as the Secretary of the Treasury shall prescribe, it shall be exempt from any tax upon such circulation.

Thomp. N. B. Cas. 806.

Tax on notes of persons or State banks, used for circulation.— 122. (SEC. 3412.) Every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, or of any State bank or State banking association, used for circulation and paid out by them.

See act of February 3, 1875, §§ 19 and 20; Thomp. N. B. Cas. 87.

Tax on notes of towns, cities, etc., used for circulation.—

123. (SEC. 3413.) Every National banking association, State bank, or banker or association, shall pay a tax of ten per centum on the amount of notes of any town, city or municipal corporation, paid out by them.

Ante, 100, 439.

Monthly returns of notes of persons, cities, State banks, etc., paid out.— 124. (SEC. 3414.) A true and complete return of the monthly amount of circulation, of deposits, and of capital

as aforesaid, and of the monthly amount of notes of persons, town, city, or municipal corporation, State banks or State banking associations paid out as aforesaid for the previous six months, shall be made and rendered in duplicate on the first day of December and the first day of June, by each of such banks, associations, corporations, companies, or persons, with a declaration annexed thereto, under the oath of such person, or of the president or cashier of such bank, association, corporation, or company, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, that the same contains a true and faithful statement of the amounts subject to tax, as aforesaid; and one copy shall be transmitted to the collector of the district in which any such bank, association, corporation, or company is situated, or in which such person has his place of business, and one copy to the Commissioner of Internal Revenue.

Ibid., § 21.

In default of returns, commissioner to estimate.—125. (Sec. 3415.) In default of the returns provided in the preceding section, the amount of circulation, deposit, capital, and notes of persons, town, city, and municipal corporations, State banks and State banking associations paid out, as aforesaid, shall be estimated by the Commissioner of Internal Revenue, upon the best information he can obtain. And for any refusal or neglect to make return and payment, any such bank, association, corporation, company, or person so in default shall pay a penalty of two hundred dollars, besides the additional penalty and forfeitures provided in other cases.

National bank to make return and payment of tax of converted State bank.—126. (Sec. 3416.) Whenever any State bank or banking association has been converted into a National banking association, and such National banking association has assumed the liabilities of such State bank or banking association, including the redemption of its bills, by any agreement or understanding whatever with the representatives of such State bank or banking association, such National banking association shall be held to make the required return and payment on the circulation outstanding, so long as such circulation shall exceed five per

centum of the capital before such conversion of such State bank or banking association.

Provisions for tax on deposits, capital and circulation, not to apply to National banks.— 127. (SEC. 3417.) The provisions of this chapter, relating to the tax on the deposits, capital, and circulation of banks, and to their returns, except as contained in sections thirty-four hundred and ten, thirty-four hundred and eleven, thirty-four hundred and twelve, thirty-four hundred and thirteen, and thirty-four hundred and sixteen, and such parts of sections thirty-four hundred and fourteen and thirty-four hundred and fifteen as relate to the tax of ten per centum on certain notes, shall not apply to associations which are taxed under and by virtue of title "NATIONAL BANKS."

See act of Feb. 18, 1875, correcting Rev. Stat.

United States securities exempt from local taxation.— 128. (SEC. 3701.) All stocks, bonds, treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority.*

Bank v. Supervisors, 7 Wall. 26; Thomp. N. B. Cas. 423, 643.

CHAPTER SEVEN.

STAMP-TAX ON BANK-CHECKS.

Tax on bank-checks.— 129. (SEC. 3418.) There shall be levied, collected, and paid for and in respect of every bank-check, draft, order or voucher for the payment of any sum of money, whatsoever, drawn upon any bank, banker, or trust company, at sight or on demand, by any person who makes, signs, or issues the same, or for whose use or benefit the same is made, signed, or issued, two cents.

Official checks exempt from tax.— 130. (SEC. 3420.) All bank-checks, drafts, or orders, as aforesaid, issued by the officers of the United States government, or by officers of any State, county, town, or other municipal corporation, are exempt from taxation: *Provided*, that it is the intent hereby to exempt from liability to taxation such State, county, town, or other municipal

* See also in this connection, section 5413, on page 514

corporations in the exercise only of functions strictly belonging to them in their ordinary governmental and municipal capacity.

Unstamped checks not admissible in evidence.— 131. (SEC. 3421.) No bank-check, draft, or order, required by law to be stamped, which is issued without being duly stamped, nor any copy thereof, shall be admitted or used in evidence in any court until a legal stamp denoting the amount of tax, is affixed thereto, as prescribed by law.*

Penalty for failure to stamp checks — stamp may be subsequently affixed by collector.— 132. (SEC. 3422.) Any person or persons who shall make, sign, or issue, or who shall cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, or shall accept, negotiate, or pay, or cause to be accepted, negotiated, or paid, any draft, or order, for the payment of money, without the same being duly stamped, or having thereupon an adhesive stamp for denoting the tax chargeable thereon, and cancelled in the manner required by law, with intent to evade the provisions of this title, shall, for every such offense, forfeit the sum of fifty dollars, and such instrument, document, or paper, draft, [or] order, not being stamped according to law, shall be deemed invalid and of no effect: *Provided*, that hereafter, in all cases where the party has not affixed to any instrument the stamp required by law thereon, at the time of making or issuing the said instrument, and he or they, or any party having an interest therein, shall be subsequently desirous of affixing such stamp to said instrument, or if said instrument be lost, to a copy thereof, he or they shall appear before the collector of the revenue of the proper district, who shall, upon the payment of the price of the proper stamp required by law, and of a penalty of double the amount of tax remaining unpaid, but in no case less than five dollars, and where the whole amount of the tax denoted by the stamp required shall exceed the sum of fifty dollars, on payment also of interest, at the rate of six per centum on said tax from the day on which such stamp ought to have been affixed, affix the proper stamp to such instrument or copy, and note upon the margin thereof the date of his so doing, and the fact that such penalty has been paid; and the

* See Thomp. N. B. Cas. 154, 368.

same shall thereupon be deemed and held to be as valid, to all intents and purposes, as if stamped when made or issued. * *

See act of June 23, 1874, and of Feb. 18, 1875, correcting Revised Statutes, p. 526.

Stamps to be cancelled — penalty for fraudulent use.—133. (SEC. 3423.) In all cases where an adhesive stamp is used for denoting any tax imposed under this chapter, except as hereinafter provided, the person using or affixing the same shall write thereon the initials of his name and the date on which such stamp is attached or used, so that it may not again be used. And every person who fraudulently makes use of an adhesive stamp to denote any tax imposed by this chapter without so effectually cancelling and obliterating such stamp, except as before mentioned, shall forfeit the sum of fifty dollars. * * *

Method of cancellation.—134. (SEC. 3424.) The Commissioner of Internal Revenue is authorized to prescribe such method for the cancellation of stamps as substitute for, or in addition to the method prescribed in this chapter, as he may deem expedient and effectual. * * *

CHAPTER EIGHT.

CRIMES AND MISDEMEANORS.

Penalty for unlawfully countersigning or delivering circulating notes.—135. (SEC. 5187.) No officer acting under the provisions of this title shall countersign or deliver to any association, or to any other company or person, any circulating notes contemplated by this title, except in accordance with the true intent and meaning of its provisions. Every officer who violates this section shall be deemed guilty of a high misdemeanor, and shall be fined not more than double the amount so countersigned and delivered, and imprisoned not less than one year and not more than fifteen years.

Penalty for offering or receiving United States or National bank notes as security for loan, etc.—136. (SEC. 5207.) No association shall hereafter offer or receive United States notes or National bank notes as security or as collateral security for any loan of money, or for a consideration agree to withhold the same

from use, or offer or receive the custody or promise of custody of such notes as security, or as collateral security, or consideration for any loan of money. Any association offending against the provisions of this section shall be deemed guilty of a misdemeanor, and shall be fined not more than one thousand dollars and a further sum equal to one-third of the money so loaned. The officer or officers of any association who shall make any such loan shall be liable for a further sum equal to one-quarter of the money loaned; and any fine or penalty incurred by a violation of this section shall be recoverable for the benefit of the party bringing such suit.

Ante, 404.

Penalty for embezzlement.— 137. (SEC. 5209.) Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.

Thomp. N. B. Cas. 138, 254, 375, 401, 501, 568, 573, 605; *ante*, 148.

Obligations or other securities of the United States defined.— 138. (SEC. 5413.) The words "obligation or other security of the United States" shall be held to mean all bonds, certificates of indebtedness, National bank currency, coupons, United States notes, Treasury notes, fractional notes, certificates of deposit, bills, checks, or drafts for money, drawn by or upon authorized officers of the United States, stamps and other repre-

sentatives of value, of whatever denomination, which have been or may [be] issued under any act of Congress.

See act of February 18, 1875, correcting Revised Statutes.

Penalty for counterfeiting National bank notes. — 139. (SEC. 5415.) Every person who falsely makes, forges, or counterfeits, or causes or procures to be made, forged, or counterfeited, or willingly aids or assists in falsely making, forging, or counterfeiting, any note in imitation of, or purporting to be in imitation of, the circulating notes, issued by any banking association now or hereafter authorized and acting under the laws of the United States; or who passes, utters, or publishes, or attempts to pass, utter, or publish, any false, forged, or counterfeited note, purporting to be issued by any such association doing a banking business, knowing the same to be falsely made, forged, or counterfeited, or who falsely alters, or causes or procures to be falsely altered, or willingly aids or assists in falsely altering any such circulating notes, or passes, utters, or publishes, or attempts to pass, utter, or publish as true, any falsely altered or spurious circulating note issued, or purporting to have been issued, by any such banking association, knowing the same to be falsely altered or spurious, shall be imprisoned at hard labor not less than five years nor more than fifteen years, and fined not more than one thousand dollars.

Penalty for using plates to print notes without authority — engraving false plate — having in possession false plate — having in possession spurious National bank notes — printing or photographing notes, etc. — bringing into the United States photographed notes, etc. — having in possession distinctive bank-note paper. — 140. (SEC. 5430.) Every person having control, custody, or possession of any plate, or any part thereof, from which has been printed, or which may be prepared by direction of the Secretary of the Treasury for the purpose of printing, any obligation or other security of the United States, who uses such plate, or knowingly suffers the same to be used for the purpose of printing any such or similar obligation, or other security, or any part thereof, except as may be printed for the use of the United States by order of the proper officer thereof; and every person who engraves, or causes or procures to be engraved,

or assists in engraving, any plate in the likeness of any plate designed for the printing of such obligation or other security, or who sells any such plate, or who brings into the United States from any foreign place any such plate, except under the direction of the Secretary of the Treasury or other proper officer, or with any other intent, in either case, than that such plate be used for the printing of the obligations or other securities of the United States; or who has in his control, custody, or possession any metallic plate engraved after the similitude of any plate from which any such obligation or other security has been printed, with intent to use such plate, or suffer the same to be used in forging or counterfeiting any such obligation or other security, or any part thereof; or who has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security, engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same; and every person who prints, photographs, or in any other manner makes or executes, or causes to be printed, photographed, made, or executed, or aids in printing, photographing, making, or executing any engraving, photograph, print, or impression in the likeness of any such obligation or other security, or any part thereof, or who sells any such engraving, photograph, print, or impression, except to the United States, or who brings into the United States from any foreign place any such engraving, photograph, print, or impression, except by direction of some proper officer of the United States, or who has or retains in his control or possession, after a distinctive paper has been adopted by the Secretary of the Treasury for the obligations and other securities of the United States, any similar paper adapted to the making of any such obligation or other security, except under the authority of the Secretary of the Treasury or some other proper officer of the United States, shall be punished by a fine of not more than five thousand dollars, or by imprisonment at hard labor not more than fifteen years, or by both.

Penalty for passing, selling, etc., counterfeit or altered notes. — 141. (SEC. 5431.) Every person who, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter,

publish, or sell, or brings into the United States with intent to pass, publish, utter, or sell, or keeps in possession or conceals with like intent any falsely made, forged, counterfeited, or altered obligation, or other security of the United States, shall be punished by a fine of not more than five thousand dollars, and by imprisonment at hard labor not more than fifteen years.

Penalty for taking impression of tools, implements, etc.— 142. (SEC. 5432.) Every person who, without authority from the United States, takes, procures, or makes, upon lead, foil, wax, plaster, paper, or any other substance or material, an impression, stamp, or imprint of, from, or by the use of any bed-plate, bed-piece, die, roll, plate, seal, type, or other tool, implement, instrument, or thing used or fitted or intended to be used, in printing, stamping, or impressing, or in making other tools, implements, instruments, or things, to be used, or fitted, or intended to be used, in printing, stamping, or impressing any kind or description of obligation or other security of the United States, now authorized or hereafter to be authorized by the United States, or circulating note or evidence of debt of any banking association under the laws thereof, shall be punished by imprisonment at hard labor not more than ten years, or by a fine of not more than five thousand dollars, or both.

Penalty for having in possession impression of tools, implements, etc.— 143. (SEC. 5433.) Every person who, with intent to defraud, has in his possession, keeping, custody, or control, without authority from the United States, any imprint, stamp, or impression, taken or made upon any substance or material whatsoever, of any tool, implement, instrument, or thing, used, or fitted or intended to be used, for any of the purposes mentioned in the preceding section; or who, with intent to defraud, sells, gives, or delivers any such imprint, stamp, or impression to any other person, shall be punished by imprisonment at hard labor not more than ten years, or by a fine of not more than five thousand dollars.

Penalty for buying, selling, or dealing in forged or altered notes.— 144. (SEC. 5434.) Every person who buys, sells, exchanges, transfers, receives, or delivers, any false, forged,

counterfeited, or altered obligation or other security of the United States, or circulating note of any banking association organized or acting under the laws thereof, which has been or may hereafter be issued by virtue of any act of Congress, with the intent that the same be passed, published, or used as true and genuine, shall be imprisoned at hard labor not more than ten years, or fined not more than five thousand dollars, or both.

Penalty for unlawfully putting in circulation the notes, drafts, etc., of closed associations—persons not officers or agents of closed associations may circulate the notes of such associations.—145. (SEC. 5437.) In all cases where the charter of any corporation which has been or may be created by act of Congress has expired, or may hereafter expire, if any director, officer, or agent of the corporation, or any trustee thereof, or any agent of such trustee, or any person having in his possession or under his control the property of the corporation for the purpose of paying or redeeming its notes and obligations, knowingly issues, reissues, or utters as money, or in any other way knowingly puts in circulation any bill, note, check, draft, or other security purporting to have been made by any such corporation whose charter has expired, or by any officer thereof, or purporting to have been made under authority derived therefrom, or if any person knowingly aids in any such act, he shall be punished by a fine of not more than ten thousand dollars, or by imprisonment not less than one year nor more than five years, or by both such fine and imprisonment. But nothing herein shall be construed to make it unlawful for any person, not being such director, officer, or agent of the corporation, or any trustee thereof, or any agent of such trustee, or any person having in his possession or under his control the property of the corporation for the purpose hereinbefore set forth, who has received or may hereafter receive such bill, note, check, draft, or other security, bona fide and in the ordinary transactions of business, to utter as money or otherwise circulate the same.

CHAPTER NINE.

SUITS, JURISDICTION AND EVIDENCE.

Jurisdiction of District Courts.—146. (SEC. 563.) The District Courts shall have jurisdiction as follows:

* * * *

Suits by or against National banks.—Fifteenth. Of all suits by or against any association established under any law providing for National banking associations within the district for which the court is held.

* * * *

Kennedy v. Gibson, 8 Wall. 506.

Jurisdiction of Circuit Courts.—147. (SEC. 629.) The Circuit Courts shall have original jurisdiction as follows:

* * * *

Suits by or against National banks.—Tenth. Of all suits by or against any banking association established in the district for which the court is held, under any law providing for National banking associations.

Kennedy v. Gibson, 8 Wall. 506; *Thomp. N. B. Cas.* 19, 109; *ante*, 106, 122, 103, 181.

Suits by National banks to enjoin Comptroller or receiver.—Eleventh. Of all suits brought by any banking association established in the district for which the court is held, under the provisions of title "THE NATIONAL BANKS," to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by said title.

* * * *

See act of Feb. 18, 1875, correcting Rev. Stat.

* * * *

Exclusive jurisdiction of United States courts.—148. (SEC. 711.) The jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States.

Suits for penalties and forfeitures.—Second. Of all suits for penalties and forfeitures incurred under the laws of the United States.

* * * *

Thomp. N. B. Cas. 335, 401, 501, 559; *ante*, 234.

In what courts suits may be brought.—149. (Sec.* 5198.) Suits, actions and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases.

See act of Feb. 18, 1875, correcting Rev. Stat.; Thomp. N. B. Cas. 77, 161, 200, 208, 220, 265, 401, 501, 559, 560, 576, 656, 699, 769, 799, 973; *ante*, 142, 297, 421.

Attachment not to issue before final judgment in State court.—150. (Sec.* 5242.) No attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any State, county or municipal court.

Thomp. N. B. Cas. 532, 801.

Proceedings to enjoin Comptroller, where had.—151. (Sec. 736.) All proceedings by any National banking association to enjoin the Comptroller of the Currency, under the provisions of any law relating to National banking associations, shall be had in the district where such association is located.

See § 5237, p. 40.

U. S. district attorney to conduct suits under supervision of Solicitor of Treasury.—152. (Sec. 380.) All suits and proceedings arising out of the provisions of law governing National banking associations, in which the United States, or any of its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury.

Thomp. N. B. Cas. 208.

Instruments and copies certified and sealed by Comptroller, may be evidence.—153. (Sec. 884.) Every certificate, assignment and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer.

* For parts of sections 5198 and 5242, see also pages 423, 503.

Certified copies of organization certificate may be evidence.— 154. (Sec. 885.) Copies of the organization certificate of any National banking association, duly certified by the Comptroller of the Currency, and authenticated by his seal of office, shall be evidence in all courts and places within the jurisdiction of the United States of the existence of the association, and of every matter which could be proved by the production of the original certificate.

Thomp. N. B. Cas. 145, 612, 622, 734.

AMENDMENTS AND ADDITIONAL ACTS.

1874-75.

AN Act fixing the amount of United States notes, providing for a redistribution of National bank currency, and for other purposes.

“The National Bank Act.”—*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, that the act entitled “An act to provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof,” approved June third, eighteen hundred and sixty-four, shall hereafter be known as the “National Bank Act.”

Lawful money reserve on circulation abolished, except as to National gold banks.—SEC. 2. That section thirty-one of the “National Bank Act” be so amended that the several associations therein provided for shall not hereafter be required to keep on hand any amount of money whatever by reason of the amount of their respective circulations; but the moneys required by said section to be kept at all times on hand shall be determined by the amount of deposits in all respects, as provided for in the said section.

See § 5191, page 490.

Redemption fund to be deposited with Treasurer — may be counted as lawful reserve—provisions relative to redemption of notes by Treasurer — mutilated notes to be returned by assistant treasurer — associations to reimburse the Treasury for cost of redemption, new plates, etc. — redemption agents in cities abolished.—SEC. 3. That every association organized, or to be organized, under the provisions of the said act, and of the several acts amendatory thereof, shall at all times keep and have on deposit in the Treasury of the United

States, in lawful money of the United States, a sum equal to five per centum of its circulation, to be held and used for the redemption of such circulation; which sum shall be counted as a part of its lawful reserve, as provided in section two of this act; and when the circulating notes of any such associations, assorted or unassorted, shall be presented for redemption, in sums of one thousand dollars or any multiple thereof, to the Treasurer of the United States, the same shall be redeemed in United States notes. All notes so redeemed shall be charged by the Treasurer of the United States to the respective associations issuing the same, and he shall notify them severally, on the first day of each month, or oftener, at his discretion, of the amount of such redemptions; and whenever such redemptions for any association shall amount to the sum of five hundred dollars, such association so notified shall forthwith deposit with the Treasurer of the United States a sum in United States notes equal to the amount of its circulating notes so redeemed. And all notes of National banks worn, defaced, mutilated, or otherwise unfit for circulation, shall, when received by any assistant treasurer or at any designated depository of the United States, be forwarded to the Treasurer of the United States for redemption as provided herein. And when such redemptions have been so reimbursed, the circulating notes so redeemed shall be forwarded to the respective associations by which they were issued; but if any of such notes are worn, mutilated, defaced, or rendered otherwise unfit for use, they shall be forwarded to the Comptroller of the Currency and destroyed, and replaced as now provided by law; *provided* that each of said associations shall reimburse to the Treasury the charges for transportation, and the costs for assorting such notes; and the associations hereafter organized shall also severally reimburse to the Treasury the cost of engraving such plates as shall be ordered by each association, respectively; and the amount assessed upon each association shall be in proportion to the circulation redeemed, and be charged to the fund on deposit with the Treasurer; *and, provided further*, that so much of section thirty-two of said National Bank Act requiring or permitting the redemption of its circulating notes elsewhere than at its own counter, except as provided for in this section, is hereby repealed.

See §§ 5192, 5195 and 5226, pages 491, 492 and 508.

Provisions for retiring circulation and withdrawing bonds — limit of withdrawal of bonds.— SEC. 4. That any association organized under this act, or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of lawful money with the Treasurer of the United States in sums of not less than nine thousand dollars, take up the bonds which said association has on deposit with the Treasurer for the security of such circulating note, which bonds shall be assigned to the bank in the manner specified in the nineteenth section of the National Bank Act; and the outstanding notes of said association, to an amount equal to the legal tender notes deposited, shall be redeemed at the Treasury of the United States, and destroyed as now provided by law; *provided* that the amount of the bonds on deposit for circulation shall not be reduced below fifty thousand dollars.

See § 5167, page 19; see §§ 5159, 5160 and 5167, pages 17 and 20.

The charter numbers of banks to be printed upon their notes.— SEC. 5. That the Comptroller of the Currency shall, under such rules and regulations as the Secretary of the Treasury may prescribe, cause the charter numbers of the association to be printed upon all National bank notes which may be hereafter issued by him.

Maximum amount of U. S. notes outstanding.— SEC. 6. That the amount of United States notes outstanding and to be used as a part of the circulating medium shall not exceed the sum of three hundred and eighty-two million dollars, which said sum shall appear in each monthly statement of the public debt, and no part thereof shall be held or used as a reserve.

Provisions relative to withdrawal of \$55,000,000 of circulation — bonds to be returned to association in proportion to circulation withdrawn.— SEC. 7. That so much of the act entitled "An act to provide for the redemption of the three per cent temporary loan certificates, and for an increase of National bank notes," as provides that no circulation shall be withdrawn under the provisions of section six of said act, until after the fifty-four millions granted in section one of said act shall have been taken up, is hereby repealed; and it shall be the duty of the Comptroller of the Currency, under the direction of the Secre-

tary of the Treasury, to proceed forthwith, and he is hereby authorized and required, from time to time, as applications shall be duly made therefor, and until the full amount of fifty-five million dollars shall be withdrawn, to make requisitions upon each of the National banks described in said section, and in the manner therein provided, organized in States having an excess of circulation, to withdraw and return so much of their circulation as by said act may be apportioned to be withdrawn from them, or, in lieu thereof, to deposit in the Treasury of the United States lawful money sufficient to redeem such circulation; and upon the return of the circulation required, or the deposit of lawful money, as herein provided, a proportionate amount of the bonds held to secure the circulation of such association, as shall make such return or deposit shall be surrendered to it.

See § 5173, p. . See act of Jan. 14, 1875, § 3.

Bonds to be sold on failure of association to return circulation — assistant treasurers and depositaries to assort and return notes to Treasury. — SEC. 8. That upon the failure of the National banks upon which requisition for circulation shall be made, or of any of them, to return the amount required, or to deposit in the Treasury lawful money to redeem the circulation required, within thirty days, the Comptroller of the Currency shall at once sell, as provided in section forty-nine of the National Currency Act, approved June third, eighteen hundred and sixty-four, bonds held to secure the redemption of the circulation of the association or associations which shall so fail, to an amount sufficient to redeem the circulation required of such association or associations, and with the proceeds, which shall be deposited in the Treasury of the United States, so much of the circulation of such association or associations shall be redeemed as will equal the amount required and not returned; and if there be an excess of proceeds over the amount required for such redemption, it shall be returned to the association or associations whose bonds shall have been sold. And it shall be the duty of the Treasurers, assistant treasurers designated depositaries and National bank depositaries of the United States, who shall be kept informed by the Comptroller of the Currency of such association as shall fail to return circulation as required, to assort and return to the Treasury

for redemption the notes of such associations as shall come into their hands until the amount required shall be redeemed, and in like manner to assort and return to the Treasury, for redemption, the notes of such National banks as have failed, or gone into voluntary liquidation for the purpose of winding up their affairs, and of such as shall hereafter so fail or go into liquidation.

Ibid. See § 5231, p. .

Providing for the issue of new notes in place of \$55,000,-000 withdrawn — new associations to be subject to National Banking Act — provisos relative to withdrawal of circulation. — SEC. 9. That from and after the passage of this act it shall be lawful for the Comptroller of the Currency, and he is hereby required, to issue circulating notes, without delay, as applications therefor are made, not to exceed the sum of fifty-five million dollars, to associations organized, or to be organized, in those States and Territories having less than their proportion of circulation, under an apportionment made on the basis of population and of wealth, as shown by the returns of the census of eighteen hundred and seventy; and every association hereafter organized shall be subject to, and be governed by, the rules, restrictions, and limitations, and possess the rights, privileges, and franchises, now or hereafter to be prescribed by law as to National banking associations, with the same power to amend, alter, and repeal provided by "the National Bank Act:" *Provided*, that the whole amount of circulation withdrawn and redeemed from banks transacting business shall not exceed fifty-five million dollars, and that such circulation shall be withdrawn and redeemed as it shall be necessary to supply the circulation previously issued to the banks in those States having less than their apportionment: *And provided further*, that not more than thirty million dollars shall be withdrawn and redeemed as herein contemplated during the fiscal year ending June thirtieth, eighteen hundred and seventy-five.

Approved June 20, 1874.

See act of Jan. 14, 1875, § 2. *Ibid.*

EXTRACT FROM AN ACT making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1875.

Notes to be destroyed by maceration instead of by burning.

— For the maceration of National bank notes, United States notes, and other obligations of the United States authorized to be destroyed, ten thousand dollars; and that all such issues hereafter destroyed may be destroyed by maceration instead of burning to ashes, as now provided by law; and that so much of sections twenty-four and forty-three of the National Currency Act as requires National bank notes to be burned to ashes is hereby repealed.

Approved June 23, 1874.

See §§ 5184 and 5225, pp. 287-293.

AN ACT to provide for the resumption of specie payments.

Issue of silver coins for the redemption of fractional currency authorized.— *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury is hereby authorized and required, as rapidly as practicable, to cause to be coined at the mints of the United States, silver coins of the denominations of ten, twenty-five and fifty cents, of standard value, and to issue them in redemption of an equal number and amount of fractional currency of similar denominations, or, at his discretion, he may issue such silver coins through the mints, the sub-treasuries, public depositories and post-offices of the United States; and, upon such issue, he is hereby authorized and required to redeem an equal amount of such fractional currency, until the whole amount of such fractional currency outstanding shall be redeemed.

Repeal of authority to charge a percentage for conversion of bullion into coin.— SEC. 2. That so much of section three thousand five hundred and twenty-four of the Revised Statutes of the United States as provides for a charge of one-fifth of one per centum for converting standard gold bullion into coin is

hereby repealed; and hereafter no charge shall be made for that service.

Repeal of provision limiting aggregate amount of circulating notes — repeal of provisions for withdrawal of currency — redemption of legal tenders, as National bank notes are issued — legal tenders not to be reduced below \$300,000,000 — coin redemption on and after January 1, 1879 — providing for coin redemption.— SEC. 3. That section five thousand one hundred and seventy-seven of the Revised Statutes limiting the aggregate amount of circulating notes of National banking associations be, and is hereby repealed; and each existing banking association may increase its circulating notes in accordance with existing law without respect to said aggregate limit; and new banking associations may be organized in accordance with existing law without respect to said aggregate limit; and the provisions of law for the withdrawal and redistribution of National bank currency among the several States and Territories are hereby repealed. And whenever, and so often as circulating notes shall be issued to any such banking association, so increasing its capital or circulating notes, or so newly organized as aforesaid, it shall be the duty of the Secretary of the Treasury to redeem the legal-tender United States notes in excess only of three hundred million of dollars, to the amount of eighty per centum of the sum of National bank notes so issued to any such banking association as aforesaid, and to continue such redemption as such circulating notes are issued until there shall be outstanding the sum of three hundred million dollars of such legal-tender United States notes, and no more. And on and after the first day of January, Anno Domini eighteen hundred and seventy-nine, the Secretary of the Treasury shall redeem in coin the United States legal-tender notes then outstanding, on their presentation for redemption at the office of the Assistant Treasurer of the United States in the city of New York in sums of not less than fifty dollars. And to enable the Secretary of the Treasury to prepare and provide for the redemption in this act authorized or required, he is authorized to use any surplus revenues from time to time, in the Treasury not otherwise appropriated, and to issue, sell, and dispose of, at not less than par, in coin, either of

the descriptions of bonds of the United States described in the act of Congress approved July fourteenth, eighteen hundred and seventy, entitled "An act to authorize the refunding of the National debt," with like qualities, privileges, and exemptions, to the extent necessary to carry this act into full effect, and to use the proceeds thereof for the purposes aforesaid. And all provisions of law inconsistent with the provisions of this act are hereby repealed.

Approved January 14, 1875.

See §§ 5177 to 5181, pp. 426-427. see act of June 20, 1874, §§ 7, 8 and 9.

AN ACT to remove the limitation restricting the circulation of banking associations issuing notes payable in gold.

Repeal of limit upon amount of circulation of National gold-banks. — *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That so much of section five thousand one hundred and eighty-five of the Revised Statutes of the United States as limits the circulation of banking associations, organized for the purpose of issuing notes payable in gold, severally to one million dollars, be and the same is hereby repealed; and each of such existing banking associations may increase its circulating notes, and new banking associations may be organized, in accordance with existing law, without respect to such limitation.

Approved January 19, 1875.

See § 5185, p. 428.

EXTRACT FROM AN ACT to amend existing customs and internal revenue laws, and for other purposes.

Tax on bank-checks. — SEC. 15. That the words "bank-check, draft, or order for the payment of any sum of money whatsoever, drawn upon any bank, banker, or trust company, at sight or on demand, two cents," in Schedule B of the act of June thirtieth, eighteen hundred and sixty-four, be, and the same is hereby, stricken out, and the following paragraph inserted in lieu thereof:

"Bank-check, draft, order, or voucher for the payment of any sum of money whatsoever drawn upon any bank, banker, or trust-company, two cents."

See § 3412.

Tax on notes of persons or State banks paid out. — SEC. 19. That every person, firm, association other than National bank associations, and every corporation, State bank, or State banking association, shall pay a tax of ten per centum on the amount of their own notes used for circulation and paid out by them.

See §§ 3412 and 3413.

Tax on notes of persons, State banks, towns, cities, etc., used for circulation. — SEC. 20. That every such person, firm, association, corporation, State bank, or State banking association, and also every National banking association, shall pay a like tax of ten per centum on the amount of notes of any person, firm, association other than a National banking association, or of any corporation, State bank, or State banking association, or of any town, city, or municipal corporation, used for circulation and paid out by them.

See §§ 3412 and 3413, p. 509.

Returns to be made to the Commissioner of Internal Revenue. — SEC. 21. That the amount of such circulating notes, and of the tax due thereon, shall be returned, and the tax paid at the same time, and in the same manner, and with like penalties for failure to return and pay the same as provided by law for the return and payment of taxes on deposits, capital, and circulation, imposed by the existing provisions of internal revenue law.

Approved February 8, 1875.

See § 3414, p. 509.

AN ACT to provide for the stamping of unstamped instruments, documents, or papers.

Stamps may be affixed to unstamped checks until January 1, 1876 — by whom, and how, affixed. — *Be it enacted by the Senate and House of Representatives of the United States of America in Congress, assembled,* that all instruments, documents, and papers heretofore made, signed, or issued, and subject to a

stamp-duty or tax under any law heretofore existing and remaining unstamped, may be stamped by any person having an interest therein, or, where the original is lost, a copy thereof, at any time prior to the first of January, eighteen hundred and seventy-six. And said instruments, documents, and papers, and any record thereof, shall be as valid, to all intents and purposes, as if stamped when made, signed or issued; but no right acquired in good faith shall in any manner be affected by such stamping as aforesaid: *Provided*, that to render such stamping valid, the person desiring to stamp the same shall appear with the instrument, document, or paper, or copy thereof, before some judge or clerk of a court of record, and before him affix the proper stamp; and the said judge or clerk shall indorse on such writing or copy a certificate, under his hand, when made by said judge, and under his hand and seal, when made by said clerk, setting forth the date at which, and the place where, the stamp was so affixed, the name of the person presenting said writing or copy, the fact that it was thus affixed, and that the stamp was duly cancelled in his presence.

See § 3422, p. 509.

Repealing clause. — SEC. 2. That all laws or parts of laws in conflict with the above are hereby repealed.

Approved June 23, 1874.

EXTRACT FROM AN ACT to correct errors and supply omissions in the Revised Statutes of the United States.

Amending section 3422 of Revised Statutes, relative to unstamped instruments — collector may affix stamp without penalty in certain cases. — Section three thousand four hundred and twenty-two is amended by inserting, after the word “issued,” in the twenty-seventh* line the following: “*and provided further*, that where it shall appear to said collector, upon oath or otherwise, to his satisfaction, that any such instrument has not been duly stamped at the time of making or issuing the same, by reason of accident, mistake, inadvertence or urgent necessity, and without any willful design to defraud the United States of

* 31st. line of this compilation.

the stamps, or to evade or delay the payment thereof, then, and in such case, if such instrument, or, if the original be lost, a copy thereof, duly certified by the officer having charge of any records in which such original is required to be recorded, or otherwise duly proven to the satisfaction of the collector, shall, within twelve calendar months after the making or issuing thereof, be brought to the said collector of revenue to be stamped, and the stamp-tax chargeable thereon shall be paid, it shall be lawful for the said collector to remit the penalty aforesaid, and to cause such instrument to be duly stamped."

Approved February 18, 1875.

See p. 509.

AN ACT authorizing the appointment of receivers of National banks, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That whenever any National banking association shall be dissolved, and its rights, privileges and franchises declared forfeited, as prescribed in section fifty-two hundred and thirty-nine of the Revised Statutes of the United States, or whenever any creditor of any National banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a National banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in section fifty-two hundred and thirty-four of said statutes.

SEC. 2. That when any National banking association shall have gone into liquidation under the provisions of section five thousand two hundred and twenty of said statutes, the individual liability of the shareholders provided for by section fifty-one hundred and fifty-one of said statutes may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill,

brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

SEC. 3. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of said statutes, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved, or allowed as therein prescribed, the full amount of such claims and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city or county where the business of such association was carried on, or, if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote; and when such agents shall have received votes representing at least a majority of the stock in value and number of shares, and when any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against such association by and before a competent court, and for the faithful performance and discharge of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them; and for this purpose said Comptroller and said receiver are hereby severally empowered

to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; whereupon the said Comptroller and the said receiver shall, by virtue of this act, be discharged and released from any and all liabilities to such association, and to each and all of the creditors and shareholders thereof; and such agent is hereby authorized to sell, compromise or compound the debts due to such association upon the order of a competent court of record, or of the United States Circuit Court for the district where the business of the association was carried on. Such agent shall hold, control and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares, may direct, distributing such assets and property among such shareholders in proportion to the shares held by each; and he may, in his own name or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands. In selecting an agent as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians may so act and sign for their ward or wards.

SEC. 4. That the last clause of section fifty-two hundred and five of said statutes is hereby amended by adding to the said section the following proviso:

“And provided, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto), to make good the deficiency; and the balance, if any, shall be returned to such delinquent shareholder or shareholders.”

SEC. 5. That all United States officers charged with the receipt or disbursement of public moneys, and all officers of National

banks shall stamp or write in plain letters the word "counterfeit," "altered," or "worthless," upon all fraudulent notes issued in the form of, and intended to circulate as money, which shall be presented at their places of business; and if such officers shall wrongfully stamp any genuine note of the United States, or of the National banks, they shall, upon presentation, redeem such notes at the face-value thereof.

SEC. 6. That all savings banks or savings and trust companies organized under authority of any act of Congress shall be, and are hereby, required to make, to the Comptroller of the Currency, and publish all the reports which National banking associations are required to make and publish under the provisions of sections fifty-two hundred and eleven, fifty-two hundred and twelve, and fifty-two hundred and thirteen, of the Revised Statutes, and shall be subject to the same penalties for failure to make or publish such reports as are therein provided; which penalties may be collected by suit before any court of the United States in the district in which said savings banks or savings and trust companies may be located. And all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to National banking associations, so far as the same may be applicable to such savings or other banks: *Provided*, that such savings banks now established shall not be required to have a paid-in capital exceeding one hundred thousand dollars.

Approved June 30, 1876.

AN ACT authorizing the conversion of National gold banks.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That any National gold bank organized under the provisions of the laws of the United States may, in the manner and subject to the provisions prescribed by section fifty-one hundred and fifty-four of the Revised Statutes of the United States, for the conversion of

banks incorporated under the laws of any State, cease to be a gold bank, and become such an association as is authorized by section fifty-one hundred and thirty-three, for carrying on the business of banking, and shall have the same powers and privileges, and shall be subject to the same duties, responsibilities and rules, in all respects, as are by law prescribed for such associations: *Provided*, that all certificates of organization which shall be issued under this act shall bear the date of the original organization of each bank respectively as a gold bank.

Approved February 14, 1880.

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of circulation, repeal of provisions requiring	3	539
of United States notes in excess of \$300,000,000	3	539

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ACCOMMODATION INDORSER.

See USURY, 805.

ACTION.

1. *Authority for National bank to sue in its old name as a State corporation.*] A State statute authorizing the State banking institutions to become banking associations under the laws of the United States, and providing for the surrender and extinction of their State charter, and "that said bank, etc., may continue to use its corporate name for the purpose of protecting and defending suits instituted by or against it, and of enabling it to close its affairs, but not for the purpose of continuing under the laws of this State its business," etc., is not in conflict with the National Banking Act. *Thomas v. Farmers' Bank of Maryland*, 248.
2. *Against bank for refusal to transfer stock on which it claims a lien.*] An assignee in bankruptcy cannot maintain an action against a National bank for the value of shares of its stock belonging to the bankrupt, and which the bank, claiming a lien on them for a debt due to it from the bankrupt, refused to transfer to the assignee. *Meyers v. Valley National Bank*, 156.
3. *Promissory note — National bank as purchaser.*] A National bank, having purchased a promissory note from an indorsee, brought an action thereon in its own name against an indorser; *held*, that the action was maintainable, whether the bank was by law authorized to acquire title to notes by purchase or not. *National Pemberton Bank v. Porter*, 266.
4. —.] Assuming that a National bank cannot purchase notes, the contract of purchase is entirely independent of the executory contract which the plaintiff is seeking to enforce; and whether the plaintiff is holding the notes for itself or for another is wholly immaterial to the defendant, unless it shall appear that it is holding them for some one who could not enforce them against the defendant, and such bank can maintain an action on such notes. *Atlas National Bank v. Savery*, 273.

Local and transitory.] See JURISDICTION, 102.

See ASSIGNMENT, 245; BANKRUPTCY, 138; CONVERSION, 454; NEGOTIABLE PAPER; RECEIVER, 163; TAXATION, 440.

ADMINISTRATOR.

Of shareholder—assessment.] A stockholder in a National bank died intestate, and his estate was settled and distributed. Intermediate his death and the distribution, the bank failed, and after the distribution an assessment was made on those who were stockholders at the time of the failure, for the payment of the bank debts. In a suit by the receiver against the administrator, *held*, that the administrator was not a shareholder at the time of the failure, within the meaning of the National Banking Act, but that the estate was liable. *Davis, receiver, v. Weed*, 115.

ASSESSMENT.

1. *On stockholders — determination of Comptroller — mode of enforcement.*] The determination of the Comptroller, as to the necessity of an assessment on stockholders of an insolvent National bank, for the payment of debts, is conclusive, and such assessment may be enforced by separate actions at law. *Bailey, receiver, v. Sawyer*, 154.

2. —.] The determination of the Comptroller, as to the necessity of an assessment on stockholders of an insolvent National bank, for the payment of debts, is conclusive, and in a suit to enforce such an assessment the necessity need not be alleged. *Strong, receiver, v. Southworth*, 172.

Of administrator of shareholder.] See ADMINISTRATOR, 115.

Mode of enforcement.] See RECEIVER, 154, 162.

ASSIGNMENT.

Of suits on promissory notes.] A National bank, having discounted a note for an indorser, and having sued the maker, may receive payment from the indorser and assign the note and the suit to the indorser, and he may prosecute it in the name of the bank for his own benefit against the maker. *Ticonic National Bank v. Bagley*, 245.

Of mortgage.] See REAL ESTATE, 227.

ATTACHMENT.

1. *Against National bank in another State.*] An attachment will not lie before final judgment against the property in one State of a National bank situated and doing business in another State. *Rhoner v. First National Bank of Allentown, Pennsylvania*; *Palmer v. Same*, 331.

2. —.] An attachment can issue against a National bank from a State court. *Robinson v. National Bank of New Berne*, 319.

See RECEIVER.

BANK BUILDING.

See TAXATION, 415.

BANKING POWERS.

1. *Agreement to exchange bonds.*] A National bank held, as depository, United States bonds belonging to plaintiff; in the spring of 1869, its cashier, for

BANKING POWERS—Continued.

a sufficient consideration, agreed with the plaintiff to exchange them for registered bonds; the bank neglected to make the exchange, and in the fall of that year the bonds were stolen. *Held*, that the bank was liable for their value. *Yerkes v. National Bank of Port Jervis*, 296.

2. *Power to act as broker in purchase of securities.*] A National bank has no inherent power to act as an agent in the purchase of bonds or stocks for third persons, and its president cannot bind it by an agreement so to act, without special authority. *First National Bank of Allentown v. Hoch*, 375.

See INDORSEMENT, 333; REAL ESTATE; MORTGAGE; MARRIED WOMAN.

BANKRUPTCY.

1. *Assignee — forum — question of power to lend money on mortgage.*] An assignee in bankruptcy should be permitted to litigate in the Federal court a question involving the powers of a National bank to make loans of a particular character on real mortgage, and not remitted to the State court. *In re Duryea*, 170.
2. *Right to sue National bank for usurious interest, assignable in.*] The right of a borrower to sue a National bank for double the amount of usury taken, is a claim or debt which shall pass to his assignee in bankruptcy, and such assignee can maintain an action thereon. *Wright v. First National Bank of Greensburg*, 138.

See ACTION, 156.

BILL.

See USURY, 419.

BILL IN EQUITY.

See JURISDICTION, 190.

BROKER.

See BANKING POWERS, 375.

CAPITAL.

See REDUCTION OF CAPITAL, 340.

CAPITAL STOCK.

See TAXATION.

CASHIER.

Act of, binding bank.] *See* TRANSFER OF STOCK, 47.

CERTIFICATE.

See EVIDENCE, 233.

CIRCULATING MEDIUM.

See CONSTITUTIONAL LAW, 489.

COLLATERAL SECURITY.

Negotiable instrument, for pre-existing debt.] A creditor who takes a negotiable note, before maturity, so indorsed that he becomes a party to the instrument, as collateral security for a pre-existing debt, in consideration of an extension of time to the debtor, actually granted, is, according to the law merchant, a holder for value, and his rights as such are not affected by equities between antecedent parties of which he had no notice. *Oates v. First National Bank of Montgomery*, 35.

See STOCKHOLDER, 144, 146; TRANSFER OF STOCKS, 273.

COMPTROLLER.

Certificate of.] *See* EVIDENCE, 232.

Determination of, as to assessment.] *See* ASSESSMENT, 154, 172.

CONFLICT OF LAWS.

See ACTION, 248; NEGOTIABLE INSTRUMENT, 90.

CONSTITUTIONAL LAW.

1. *Federal tax on circulating notes of municipalities.*] The provision of section 8418 of the National Bank Act, that "every National banking association, State bank or banker, or association, shall pay a tax of ten per centum on the amount of notes of any town, city or municipal corporation paid out by them," is constitutional even where its effect is to tax an instrumentality of a State. *Merchants' National Bank of Little Rock v. United States*, 100.
2. —.] The provision of the National Bank Act that National banks, and State banks, bankers and associations shall be taxed on the amount of town, city or municipal corporation notes paid out by them, is constitutional. *National Bank v. United States*, 439

See TAXATION, 350.

CONTRACT.

1. *By director, when binding on bank — ratification — estoppel.*] The president of the defendant bank informed the plaintiff that the bank was about to be reorganized, and that if he would act as a director, and his firm would continue to give the bank their business and use their influence in its behalf, they would give him ten shares of the stock. The plaintiff acceded, was elected and served as a director, and his firm continued to give the bank their business. *Held*, that the agreement to give the stock was valid, and enforceable against the bank. *Rich v. State National Bank of Lincoln*, 284.

CONTRACT—*Continued.*

2. *Specific enforcement of, for sale of National bank stock.*] In an equitable action to enforce specific performance of an agreement to sell shares in a National bank, which the purchaser wished to obtain for the purpose of securing control of the bank, *held*, that specific performance would not be decreed, (1) because generally equity will not enforce specific execution of a contract relating to personal chattels, and (2) because a decree enforcing the agreement in question would be against public policy. *Felt's Appeal*, 411.

CONVERSION.

Of State bank to National bank — action by latter on cause of action accruing to former.] A State bank paid its president money to reimburse him for money which he falsely represented he had paid to its creditor. The State bank was afterward changed to a National bank, and the creditor recovered judgment against it for his debt. *Held*, that it could maintain an action against the president for money had and received, although the State statute provided that the State bank should be continued a body corporate for three years for the purpose of prosecuting and defending suits, closing its concerns, and conveying its property. *Atlantic National Bank v. Harris*, 454.

See TAXATION, 459.

COUPONS.

See NEGOTIABLE INSTRUMENT.

COURT.

See JURISDICTION, 180.

CROSS-BILL.

See JURISDICTION, 104.

DEPOSITS FOR SAFE-KEEPING.

1. *Liability for.*] A National bank, receiving a special deposit for safe-keeping without reward, is liable only for gross negligence; the burden of proof is on the plaintiff; and gross negligence is not the omission of that care which every attentive and diligent person takes of his own goods, but the omission of that care which the most inattentive takes. *First National Bank of Allentown v. Rex*, 373.
2. *Wrongful contract of officer.*] *It seems*, when the president of a bank, for his own private purposes, hypothecates bonds especially deposited with the bank for gratuitous safe-keeping, and they are thereby lost, the bank is not liable, unless the bank officers knew, and assented, or used no effort to recover them. *Id.*
3. *Liability for loss of.*] A National bank received, for safe-keeping, government bonds belonging to G. From time to time the cashier of the bank cut off the coupons and collected the same, placing the amount to the

DEPOSITS FOR SAFE-KEEPING—*Continued.*

credit of G., paying it to him when demanded. For this service the bank received no compensation. Through the gross negligence of the bank or its officers the bonds were lost. *Held*, that the bank was liable. *First National Bank of Carlisle v. Graham*, 64.

4. —.] It is competent for a National bank to receive special deposits of securities, either on a contract of hiring, or without reward, and it will be liable for their loss through its negligence. *Id.*
5. —.] A National bank is liable for a special deposit, received by its teller on behalf of the bank, in accordance with its usage, for gratuitous safe-keeping, and lost through its gross negligence. *Pattison v. Syracuse National Bank*, 319.

EMBEZZLEMENT.

1. *Definition.*] The word "embezzle," as found in the United States Revised Statutes, is used to describe a crime which a person has an opportunity to commit by reason of some office or employment, and which may include some breach of confidence or trust. *United States v. Conant*, 148.
2. *Jurisdiction of State court.*] A State court has no jurisdiction to try a cashier of a National bank for embezzling its funds. *Commonwealth ex rel. Torrey v. Ketner*, 404.

ESTOPPEL.

See CONTRACT, 284; SALE, 1; ULTRA VIRES, 462.

EVIDENCE.

1. *Of violation of banking powers, when incompetent.*] In an action by a National bank against the maker of a note for accommodation, evidence was offered to prove a violation by the bank of section 5200 of the Revised Statutes of the United States, which declares "the total liabilities to any association of any persons or any company, corporation or firm, for money borrowed, including in the liabilities those of the several members thereof, shall at no time exceed one-tenth of the amount of the capital stock of such association, actually paid in;" and that the loans in pursuance of it were in excess of the authority and power of the bank. The evidence being rejected, *held* no error. *Stephens v. Monongahela Nat. Bank*, 398.
2. *Private charter — judicial notice.*] A bank is a private corporation, and its charter a private act, to be pleaded and proven as all other private acts. The court cannot take judicial cognizance of the fact that there are State banks whose charters authorize them to take more than six per cent interest. *Gruber v. First Nat. Bank of Clarion*, 332.
3. *Of existence of bank — certificate of Comptroller of Currency.*] In an action by a National bank on a note, where the existence of the corporation is denied, the certificate of the Comptroller of the Currency, under section 23 of the National Banking Act, that the association had complied with

EVIDENCE—*Continued.*

the law and was authorized to do banking business, was competent evidence, and in connection with proof that the association had done banking business for several years, and the fact that the note was in terms payable at the bank, makes a *prima facie* case. *Mis v. National Bank of Bloomington*, 232.

EXECUTOR.

Foreign, transfer of stock by.] See TRANSFER OF STOCK, 187.

EXEMPTION.

Of trustee from personal liability.] See TRUSTEE, 110.

EXHIBITION.

Of bank books — compelling.] See TAXATION, 176.

FRAUD.

See USURY, 364.

FRAUDULENT ENTRIES.

Jurisdiction of State court.] A teller of a National bank may be tried by a State court for fraudulently making false entries in the bank books, with intent to defraud the bank. *Luberg v. Commonwealth*, 406.

FORFEITURES.

Liberal, not favored.] See NATIONAL CURRENCY ACT, 9.

See USURY, 364.

GUARANTY.

1. *Of notes by bank — authority of vice-president.*] The vice-president of a National bank, upon making a transfer for value of certain notes belonging to the bank (the bank being the correspondent of the transferee), executed this guaranty: "In accordance with your telegram I herewith hand you ten notes of \$5,000 each." "We debit your account \$50,000." "This bank hereby guarantees the payment of the principal sum and interest of said notes." This was done in behalf of the bank, and the notes were also indorsed by the same individual as vice-president of the bank. It was done with the knowledge and consent of the president and cashier of the bank, but without authority of the directors, as a board, or the majority of its members individually. *Held*, that the bank was liable on the guaranty. *People's Bank of Belleville v. Manufacturers' National Bank of Chicago*, 97.
2. *Lending of credit by.*] A National bank, upon the deposit of collateral security with it, has no power to guarantee the obligation of the person making such deposit. *Seligman v. Charlottesville National Bank*, 195.

INDICTMENT.

Form.] Any thing that forms a part of the description of the crime is not a "matter of form" within the meaning of the National Bank Act. *United States v. Conant*, 148.

INDIVIDUAL LIABILITY.

See STOCKHOLDER, 144, 146; TRUSTEE, 110; ADMINISTRATOR, 115.

INDORSEMENT.

1. *By married woman charging her estate— not a mortgage.*] An indorsement by a married woman, expressly charging her estate with the payment of the note, is such a security as a National bank may take. *Third National Bank v. Blake*, 800.
2. *By National bank and procural of discount — title to such paper.*] A National bank agreed with the maker of notes to procure their discount for a commission, and indorsing them under an accommodation indorser, procured their discount by another National bank, before maturity, in good faith, and without notice. The notes being dishonored, the bank indorser took them up, and sued the accommodation indorser. *Held*, that the action was maintainable. *National Bank of Gloversville v. Wells*, 333.

INDORSER.

Accommodation.] See USURY, 305.

INJUNCTION.

See TAXATION, 219.

INSOLVENCY.

See RECEIVER.

INTEREST.

Rate of.] Under the National Banking Act, any National bank in Pennsylvania can charge and take the same rate of interest as any State bank of issue is authorized to charge. *First National Bank of Mt. Pleasant v. Tinstman*, 182.

See USURY.

INTERPLEADER.

See JURISDICTION, 104.

JUDICIAL NOTICE.

See EVIDENCE, 382.

JUDGMENT.

For damages against insolvent bank — payment of.] See TRANSFER OF STOCK, 47.

JURISDICTION.

1. *Of Federal courts.*] The Federal Circuit Court has unconditional jurisdiction of all suits to which a National bank is a party, irrespective of amount or citizenship. *Mitchell, for use of First National Bank of Butler, v. Walker*, 180.
2. —.] Where the State and the Federal courts have concurrent jurisdiction, a State statute of limitation may be pleaded as effectively in a Federal court as it could be in a State court; and in such cases the Federal courts will follow the decisions of the local State tribunals and will administer the same justice which the State courts would administer between the same parties. *Price, receiver, v. Yates*, 204.
3. — *of suits by banks.*] National banks are not authorized to institute suits in the Federal courts out of the districts where they are established, when the amount in controversy does not exceed \$500. *St. Louis National Bank v. Brinkman*, 141.
4. — *removal.*] A National bank, sued in a State court, cannot enforce the removal of the cause to the Federal court on the ground that the latter has exclusive jurisdiction. *Pettiton v. Noble*, 120.
5. — *local and transitory actions.*] The provision of the National Bank Act in relation to suits against National banks, section 5198, that "suits, actions, and proceedings against any association under this title, may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases," *held*, to apply to transitory actions only, and not to such actions as are by law local in their character. *Casey, receiver of New Orleans National Banking Association, v. Adams*, 102.
6. *Of State courts.*] State courts have jurisdiction of questions arising under the National Banking Act. *Pickett v. Merchants' National Bank of Memphis*, 209.
7. *Bill in equity.*] The District Court of the United States has jurisdiction of a bill in equity filed by a National bank. *Fifth National Bank of Pittsburgh v. Pittsburgh and Castle Shannon Railroad Company*, 190.
8. *Cancellation of mortgage.*] A proceeding against a National bank for the cancellation of a mortgage may be brought in a parish of Louisiana where the bank is not situated. Section 5198 of the National Bank Act does not exclude other forums than those specified, and relates only to actions to recover usurious interest. *New Orleans Banking Association v. Adams*, 207.
9. *Cross-bill — interpleader.*] The Federal courts have jurisdiction over all suits by and against National banks, irrespective of the subject-matter. Joining merely nominal or personal parties has no effect either to confer or exclude the jurisdiction; but trustees, executors and the like are not formal parties, within the meaning of the rule, where in fact interested

JURISDICTION—*Continued.*

in the litigation. Accordingly, where two or three persons, claiming a certain fund which was in the custody of a National bank, brought their bill in equity against the bank and a third claimant, and the bank exhibited its cross-bill, praying that the parties might interplead, *held* to confer jurisdiction. *Foss v. First National Bank of Denver*, 104.

10. — *on contract.*] A State court has jurisdiction of an action on contract brought by a resident of the State against a National bank located in another State, and except as against a National bank which has committed or is contemplating an act of insolvency. *Robinson v. National Bank of New Berne*, 309.

11. — *to recover illegal interest.*] State courts have jurisdiction of actions to recover illegal interest reserved by National banks upon loans. *Bliss v. Columbia National Bank*, 386.

See EMBEZZLEMENT, 404; FRAUDULENT ENTRIES, 408; TAXATION, 74; USURY, 382, 395, 421.

LICENSE.

A city has no power to exact a license fee from a National bank. *City of Carthage v. First Nat. Bank of Carthage*, 279.

LOCATION.

Of bank.] *See* TAXATION, 177.

MARRIED WOMAN.

See INDORSEMENT, 300.

MORTGAGE.

Power to enforce.] A National bank, organized as successor to a State bank, may maintain an action to foreclose a mortgage of real estate executed to the State bank as security for a note, and assigned to it by the State bank on the formation of the National bank. *Scofield v. State Nat. Bank of Lincoln*, 280.

As security.] *See* REAL ESTATE, 222, 224, 227, 237, 293, 300, 424, 426.

MUNICIPAL CORPORATION.

No power to exact license fee.] *See* LICENSE, 279; TAXATION, 219.

NATIONAL CURRENCY ACT.

Construction of — liberal forfeitures not favored.] The National Currency Act should be liberally construed to effect the ends for which it was passed, but a forfeiture under its provisions should not be declared unless the facts upon which it rests are clearly established. In case of a claim of forfeiture against a bank for taking unlawful interest upon the discount of bills of exchange payable at another place, it should appear affirmatively that the bank knowingly received or reserved an amount in excess

NATIONAL CURRENCY ACT—*Continued.*

of the statutory rate of interest and the current exchange for sight drafts. Accordingly, where it was not shown what the rate of exchange was, a charge of one-quarter of one per cent in addition to the statutory rate of interest would not be sufficient to authorize a forfeiture. *Wheeler v. Union Nat. Bank of Pittsburgh*, 9.

NEGLECTANCE.

Liability for loss of special deposit.] See DEPOSITS FOR SAFE-KEEPING, 64.

NEGOTIABLE INSTRUMENT.

1. *Conflict of law.*] The courts of the United States, in determining questions of general commercial law, are not controlled by the decisions of a State court, even in an action instituted by a National bank, located in the State rendering such decision, against one of its own citizens, upon a negotiable note there executed and payable. Such decisions, not based upon local legislative enactments, are not "laws" within the meaning of the Federal statute, which provides that "the laws of the several States, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." *Brooklyn City and Newtown R. R. Co. v. Nat. Bank of the Republic*, 90.
2. *Power to purchase.*] A bank, empowered to discount negotiable notes, has power to purchase such notes. *Pape v. Capitol Bank of Topeka*, 238.
3. —.] National banks have no power to purchase negotiable paper except from surplus capital. *Lazear v. Nat. Union Bank of Baltimore*, 261.
4. *Coupons.*] A National bank may take, hold and sue upon coupons issued with and annexed to town bonds, but payable to bearer and separated from the bonds, and assumpsit is the proper form of action. *First Nat. Bank of North Bennington v. Town of Bennington*, 437.

NON-RESIDENTS.

See TAXATION, 350.

NOTES.

Purchase of.] See NEGOTIABLE PAPER, 238, 261; ACTION, 266, 273.

OFFICER.

1. *Of National bank—power to bind bank away from banking-house.*] Although the duties of the president of a National bank are generally transacted at its place of business, yet the bank will be bound by his acts, within the apparent scope of his authority, although performed away from the place where the bank is situated, and even in another State, when the bank is informed of them and does not object, and there is no fraud. *Burton, receiver of First Nat. Bank of La Crosse, v. Burley, receiver*, 184.
2. — *may borrow money of bank.*] An officer of a National bank may borrow money of the bank. *Blair v. First National Bank of Mansfield*, 173.

PLEDGER.

Liability of, as stockholder.] See STOCKHOLDER, 25, 144.

PRESIDENT.

See OFFICER, 134.

PRIORITY.

Of United States claims.] The United States government has a priority over other creditors on the proceeds of the sale of bonds deposited as security for the circulation of National bank bills, as well as a prior claim in the distribution of the bank assets, for the payment of claims of the government against such bank, and may apply the proceeds of such assets to the payment *pro tanto* of its claim for postal funds and money order funds deposited in such bank by the postmaster. *United States v. Cook County National Bank*, 128.

PURCHASE.

Of negotiable paper, not void.] See NEGOTIABLE PAPER, 238.

—, *when valid.]* See NEGOTIABLE PAPER, 261, 266, 273.

Of securities, power to.] See BANKING POWERS, 375.

RATIFICATION.

See CONTRACT, 284.

REAL ESTATE.

1. *Loan on real security not void.]* A National bank loaned money and took as security therefor an assignment of a note and deed of trust of real estate. *Held*, that the deed of trust was not void and that the bank would not be enjoined from selling thereunder. *Union National Bank, Skinker and others v. Matthews*, 12.
2. —.] While a National bank is prohibited by law from loaning money on real security, yet if it does make a loan on such security the security is not void but may be enforced. *Ib.*
3. *Mortgage for antecedent debts.]* As security for a pre-existing debt, a National bank may make an assignment of a note and a real mortgage contemporaneously executed to secure such note. *Worcester National Bank v. Cheeney*, 227.
4. —.] A National bank may take a mortgage of real estate, to secure an antecedent indebtedness, at the time of renewing, and under an agreement for future renewals of the notes evidencing the debt. *Howard National Bank of Burlington v. Loomis*, 424.
5. —.] To secure a pre-existing debt, in good faith, a National bank may acquire title to real estate by direct conveyance or judicial sale, although such real estate may be incumbered. *Mapes v. Scott*, 228.

REAL ESTATE—*Continued.*

6. —.] A mortgage of real estate executed to a National bank as security for a matured antecedent loan is not void. *Warren v. De Witt County National Bank*, 223.
7. — *as security for loans.*] A National bank is not prohibited from taking real estate security for loans. *Wroten's Assignee v. Armat*, 426.
8. —.] A real mortgage to a National bank to secure a present debt of future advances is not void. *First National Bank of Waterloo v. Elmore*, 287.
9. — *power to take.*] A mortgage to a National bank to secure a present loan by the discount of commercial paper in the usual course of business, is not void, but only voidable at the election of the government. *Graham v. National Bank of New York*, 293.
10. — *to bank officer to secure present loan.*] A real mortgage executed to a bank officer, at the time of, and to secure a loan by the bank, is void. *Fridley v. Bowen*, 224.

See TRANSFER OF STOCK, 278.

RECEIVER.

1. *Jurisdiction to appoint—injunction.*] Where judgment has been rendered in a State court against a National bank, and upon the execution issuing thereon a return of *nulla bona* has been made by the sheriff of the county where the bank is located, and the bank has ceased to discharge its functions as a fiscal agent of the United States, and is disposing of its assets, which cannot be reached by levy and sale under the common-law execution among its stockholders, thereby endangering the safety of those assets and the judgment debt of the creditor, equity will relieve by the grant of injunction and the appointment of a receiver. *Merchants and Planters' National Bank v. Trustees of Masonic Hall*, 220.
2. —.] Until a receiver has been appointed by a Federal court wherein the interposition of equity to settle the affairs of a National bank was invoked, and the appointment of a receiver asked to take charge of the assets, neither law or comity requires the State court to suspend its equitable remedy to reach the assets of the bank and enforce its own final process until the Federal court shall act—especially where in the Federal court the case is made by the stockholders of the bank and the judgment creditor is not made a party thereto. *Ib.*
3. *Compositions by.*] A court has no power, under section 5324, U. S. Rev. Stats., to order the receiver of a National bank to compound debts, which are not "bad or doubtful;" and a composition under such an order of debts not "bad or doubtful," as the debt of a shareholder arising on his subscription to the stock, is ineffectual. *Price, receiver, v. Yates*, 204.
4. *Power to sue in his own name—mode of enforcing assessments.*] A receiver of a National bank is a Federal officer, and may sue in his own name to enforce assessments against stockholders, and for that purpose he may

RECEIVER—*Continued.*

bring separate actions at law against the several stockholders. *Stanton, receiver, v. Wilkeson*, 163.

5. *Tax.*] A tax levied on the property of a National bank subsequent to its insolvency is subordinate to the rights of a receiver appointed after such levy. *Woodward v. Ellsworth*, 216.
6. *Attachment — equitable relief.*] After a circulating note of a National bank had been protested for failure to redeem it in lawful currency, an attachment from a State court was levied on moneys of that bank deposited in another National bank to secure a debt to A. Subsequently a receiver of the first bank was appointed, and without becoming a party to the suit, applied to the State court to dissolve the attachment, which motion was denied. He then brought this suit against A, the second bank, and the sheriff, to assert his title to such deposit. *Held*, that the levy was void, and he was entitled to the relief asked. *Harvey, receiver, v. Allen*, *489.

See COMPOSITION, 204 ; SET-OFF, 274, 353.

REDUCTION OF CAPITAL.

Accumulation of surplus.] A National bank, reducing its capital, cannot retain, as a surplus or for any other purpose, any portion of the money which it received for retired stock, and having refused to permit shares thus retired to be transferred on its books, is liable for the value of the shares to the holder. *Seeley v. New York Nat. Exchange Bank*, 340.

RELIGIOUS SOCIETY.

See TRUSTEE, 110.

REMOVAL OF CAUSE.

1. *To Federal court.*] Banks organized under the acts of Congress, as National banks, are not entitled by force of such act to have any suit or proceeding in the State court, wherein they are parties defendant, removed to the Federal court. *Wilder v. Union National Bank*, 124.
2. —.] To authorize a removal on the ground that the controversy involves a question arising under Constitution or laws of the United States, it must fully appear from all the record that a Federal question is presented. So, where, in a petition for removal to the Federal court, the defendant states that certain laws of the State of Illinois infringe upon or violate the tenth section of article two of the Constitution of the United States, but fails to state in what respect, or how the rights, either of the plaintiff or defendants, are affected by the operation of those laws, the record does not show sufficiently that it is a case coming within the Federal jurisdiction. *Id.*
3. —.] If the record presents a Federal question, that a right of action or defense arising under the Constitution and laws of the United States, the citizenship of the parties has nothing to do with it. *Id.*

See JURISDICTION, 120.

RENEWAL.

If a payee take from the maker of a promissory note, and at the same time surrender the maker's note of an earlier date, given for a loan of money, the facts, and not merely what the payee called the transaction, will determine whether it was a renewal or payment of the original loan. *Bank of Cadis v. Stemmons*, 861.

REPEAL.

See STATUTORY CONSTRUCTION, 128.

RESERVE.

See TAXATION, 296.

SALE.

By National bank to directors of corporate stock held as collateral for loans, when valid.] H. being indebted to a National bank for a considerable sum, for which the bank held certain corporate stock as collateral security, in writing, authorized the president and directors of the bank to sell at their discretion all the stock and apply the proceeds of the sale upon his indebtedness. Thereafter, after giving H. ample notice of an intention to sell, the stock was sold and transferred to three of the directors of the bank, at a price above the market value, and the amount received from the sale applied upon the indebtedness of H. H. received an itemized statement of the proceeds of the sale and of its application upon his indebtedness to all of which he made no objection. Five years thereafter, H. commenced an action against the bank for the purpose of obtaining a decree redeeming the stock, and for an accounting. *Held*, that the action could not be maintained; first, because by his silence he was estopped; and second, because of delay in bringing suit. *Hayward v. Eliot National Bank*, 1

SECURITY.

See REAL ESTATE.

SET-OFF.

1. *Right of.*] A right of set-off, perfect and available, against a bank at the time of the appointment of a receiver, may be pleaded in an action by the receiver. *Hads, receiver, v. Mc Vey*, 353.
2. *Amount of.*] In an action on a note discounted by a National bank, the defendant cannot set off twice the amount of interest paid on other loans. *Id.*
3. — *as against receiver of insolvent bank.*] The receiver of an insolvent National bank sued A. and B. on their joint note given to the bank. They claim to set off notes given by the bank, and C. and D., who were also insolvent, as joint makers, to D. alone, and maturing after the receiver's appointment, and growing out of a distinct transaction from the note in suit. *Held*, not a proper set-off. *Balch v. Wilson*, 274.

See STATUTE, 35; USURY, 305.

SHAREHOLDER.

See STOCKHOLDER.

SHARES.

See TAXATION, 843.

STATUTORY CONSTRUCTION.

1. *Repeals.*] Repeals by implication are not favored by the courts, and in the absence of express words of repeal, it is the duty of the court to give effect to a prior statute, if it can be done, unless the repugnancy between the two is so absolute and palpable as to be recognized at once. *United States v. Cook Co. Nat. Bank*, 138.
2. *Usury.*] The statutes of Alabama examined, and held to place bills of exchange and promissory notes, payable in money, at "a certain place of payment designated therein," upon the same basis as to immunity from set-off, discount or equities, as bills and notes payable at a bank or private banking-house. Such declared to be the intention and effect of the act of April 8, 1878, amending section 1833 of the Revised Code of Alabama. *Oates v. First Nat. Bank of Montgomery*, 35.
3. —.] The intention of the legislature, clearly expressed in a constitutional enactment, should not be defeated by too rigid adherence to the letter of the statute, or by technical rules of construction. Any construction should be disregarded which leads to absurd consequences. *Ib.*
4. —.] The Federal courts are not bound by decisions of State courts upon questions of general commercial law. *Ib.*
5. —.] A National bank, at the request of its debtor, gave further time in consideration of the transfer, before maturity, of a negotiable note, as collateral security, and in consideration also of the payment, in advance, of usurious interest, for the period of extension. The note was so indorsed as to make the bank a party to the instrument, responsible for its due presentation, and for due notice of non-payment. The consideration was, in part, legal and, in part, vicious. The former was itself sufficient to sustain the contract of extension and transfer, and to constitute the bank a holder for value. While the bank was subject to the penalties, denounced by law for taking usurious interest, the statute under which it was organized had not declared the contract of indorsement void. No such penalty being prescribed, the courts could not superadd it. *Ib.*
6. —.] The limitation of two years in the National Banking Act, for the recovery of forfeitures for usury, does not apply to the defense of usury. *Pickett v. Merchants' Nat. Bank of Memphis*, 209.

. STATUTE OF LIMITATIONS.

Action to enforce shareholder's liability.] In an action by the receiver of a National bank to enforce the liability of a shareholder, it appeared that the date of the defendant's subscription to the stock was prior to May, 1866, when the receiver was appointed; that the Comptroller of the Cur-

STATUTE OF LIMITATIONS—*Continued.*

rency decided on the 28th of June, 1876, that the enforcement of this liability to its full extent was necessary, and instructed the receiver accordingly, and that this action was thereupon brought. *Held*, that although such decision and order of the Comptroller were necessary preliminaries to a suit against the shareholder; yet having been delayed without sufficient apparent reason for more than six years from the date of the subscription, the statute of limitation was a bar to the action—the State courts having decided that an act necessarily preliminary to the commencement of a suit upon a contract must be done within six years, unless sufficient reason for the delay is shown. *Price v. Yates*, 204.

See JURISDICTION, 204; STATUTORY CONSTRUCTION, 209; TRANSFER OF STOCK, 47.

STOCK.

Sale of collaterals.] *See* SALE, 1.

Specific enforcement for sale of.] *See* SPECIFIC ENFORCEMENT, 411; TAXATION.

STOCKHOLDERS.

1. *Liability of colorable transferees.*] S. bought shares in a National bank and caused them to be transferred to E., who was in his employ, S. remaining the real owner. *Held*, that S. was liable as stockholder upon the failure of the bank. *Davis, receiver, v. Stevens*, 158.
2. — *of pledges of stock—transfer to escape liability.*] One to whom stock had been transferred in pledge or as collateral security for money loaned and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors. Where the owner, holder or pledgee of stock transfers it out and out for the purpose of escaping liability as a shareholder to one who is unable to meet such liability, or when the transfer is colorable and not absolute, the transfer is ineffective as to creditors and the transferor will be still liable. Therefore, when the G. Bank loaned money and took as collateral therefor shares of stock in the C. Bank, which was duly transferred in the books of the C. Bank, and afterward the G. Bank transferred these shares to one of its clerks, with an understanding that he should re-transfer on request, and the C. Bank was then in failing condition, *held*, that the G. Bank was liable to contribute as a stockholder to the debts of the C. Bank. *Germania Nat. Bank of New Orleans v. Case, receiver*, 5.
3. — *holding as security.*] One who procures a transfer to himself, on the books of a National bank, of stock in such bank becomes liable for the engagements of the bank as prescribed in the National Bank Act, although such stock was pledged to him by the owner, simply as security for a debt. *Moore v. Jones*, 144.
4. — *surrender of certificate.*] One in whose name the shares of the stock of a National bank stand on the bank-books is subject to the individual liability of a shareholder, although his holding of the stock was originally

STOCKHOLDERS—*Continued.*

as collateral security for a loan, and the loan has been repaid, and the stock certificate surrendered with an executed power of attorney for transfer. *Bowdell v. Farmers and Merchants' National Bank of Baltimore*, 146.

5. *Standing in court.*] Stockholders have no standing in court to interfere for the protection of their company until the board of directors of the company have neglected or refused an application to take the proper steps to protect the interests of the company. *Fifth National Bank of Pittsburgh v. Pittsburgh and Castle Shannon Railroad Co.*, 190.

See ASSESSMENT.

SURPLUS.

See TAXATION, 296; *REDUCTION OF CAPITAL*, 340.

TAXATION.

1. *Of shares—mode of valuation.*] The provision of the National Bank Law that State taxation on the shares of the banks shall not be at a greater rate than is assessed on other money capital in the hands of citizens of the State, has reference to the entire process of assessment, and includes the valuation of the shares as well as the ratio of percentage charged on such valuation. *People ex rel. Williams v. Weaver*, 57.
2. —.] A statute of a State, therefore, which establishes a mode of assessment by which the shares of the National banks are valued higher in proportion to their real value than other money capital, is in conflict with the act of Congress, though no greater percentage is levied on that valuation than on the valuation of other moneyed capital. *Ib.*
3. — *deduction of debts.*] The statute of New York of 1866, which permits a debtor to deduct the amount of his debts from the valuation of all his personal property including moneyed capital, except his bank shares taxes these shares at a greater rate than other moneyed capital, and is therefore void as to the shares of National banks. *Ib.*
4. —.] Although the statutes of a State provide for the valuation of all moneyed capital for purposes of taxation, at its true cash value, including shares of the National banks, the systematic and intentional valuation of all other moneyed capital by the taxing officers far below its true value, while National bank shares are assessed at their full value, is a violation of the act of Congress which prescribes the rules by which those shares shall be taxed by State authority. *Pelton v. Commercial National Bank*, 85.
5. — *injunction.*] In such case, on the payment or tender of the sum which the bank shares ought to pay under the rule established by the act of Congress, a court of equity will enjoin the State authorities from collecting the remainder. *Ib.*
6. —.] The Constitution of Ohio declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks,

TAXATION—*Continued.*

joint-stock companies, or otherwise ; and also all the real and personal property, according to its true value in money." And the legislature has passed laws providing separate State boards of equalization for real estate, for railroad capital, and for bank shares, but there is no State board to equalize personal property, including all other moneyed capital. The equalizing process as to all other personal property and moneyed capital ceases with the county boards. *Cummings v. Merchants' National Bank*, 74.

7. —.] Throughout a large part of the State of Ohio, including Lucas county, in which the plaintiff bank is located, perhaps all over the State, the officers charged with the valuation of property for purposes of taxation adopted a settled rule or system, by which real estate was estimated at one-third of the true value, ordinary personal property about the same, and moneyed capital at six-tenths its true value. The State board of equalization of bank shares increased the valuation of these shares to their full value. This court holds:

(1) That the act creating the board for equalizing bank shares is not void as a violation of the Constitution of Ohio, because if the local assessors would discharge their duty by assessing *all property* at its actual cash value the operation of the equalizing board would work no inequality of taxation, and a law cannot be held to be unconstitutional which in itself does not conflict with the Constitution, because of the injustice produced by its maladministration.

(2) The rule or principle of unequal valuation of different classes of property for taxation, adopted by local boards of assessment, is in conflict with the Constitution of Ohio and works manifest injustice to the owners of bank shares.

(3) When a rule or system of valuation for purposes of taxation is adopted by those whose duty it is to make the assessment, which is intended to operate unequally, in violation of the fundamental principles of the Constitution, and when this principle is applied not solely to one individual, but to a large class of individuals or corporations, equity may properly interfere to restrain the operation of the unconstitutional exercise of power.

(4) The appropriate mode of relief in such cases is, upon payment of the amount of the tax which is equal to that assessed on other property, to enjoin the collection of the illegal excess. *Ib.*

8. —.] An assessment of tax on the stock of a National bank in New Jersey, owned by a stockholder residing in the city where the bank is located, cannot be sustained by the presumption that the stockholder resided in the ward in which the bank was located, but the assessment must be made against the stockholder. *State, North Ward National Bank, pros., v. Newark*, 290.
9. — *non-residents — National bank stock.*] A statute empowering the authorities of a town to impose the same taxes, for municipal purposes, upon non-residents pursuing their ordinary avocations within the corpo-

TAXATION—Continued.

- rate limits as upon the inhabitants, with a *proviso* that non-residents so taxed shall have the right to vote at municipal elections, is not abrogated by a change in the State Constitution which deprives the non-resident tax payer of his vote, and authorizes a tax upon the shares in a National bank, located in the town, and held by one who conducts his ordinary business therein, but whose residence is in the county, outside the corporate limits. *Moore v. Mayor and Commissioners of Fayetteville*, 850.
10. — *place of.*] National bank shares, owned by residents, may be assessed at their residence or at the location of the bank, as the State legislature may direct, and a State law directing the assessment where the person required to list them resides, is valid. *Bule v. Commissioners of Fayetteville*, 848.
 11. *Capital stock — legal tenders.*] Action to recover taxes. The defendant was a State bank, with a capital of \$1,000,000. It was possessed of less than \$200,000 worth of real estate. The plaintiff city assessed it, in addition to its real estate, for the sum of \$700,000 as its capital or money at interest. The bank refused to pay the tax, on the ground that its capital not invested in real estate consisted of United States legal tender notes, not taxable. *Held*, that the tax was lawfully levied. *New Orleans Canal and Banking Company v. City of New Orleans*, 32.
 12. *Of State bank in transition to a National bank.*] While a State bank is changing to a National bank, and before the requirements of the State statute are fully complied with, it is subject to State taxation. *Commonwealth v. Manufacturers' and Mechanics' Bank of Philadelphia*, 459.
 13. *National bank can be located in but one place.*] A National bank located in New Jersey, for the convenience of persons in Philadelphia, kept a clerk in that city who received deposits. *Held*, that the bank did not become located in Philadelphia so as to be liable to taxation. *Nat. State Bank of Camden v. Pierce*, 177.
 14. *Bank building — when not liable to taxation for county purposes.*] Where part of the capital of a National bank is invested in a building used for banking purposes, and the bank pays into the State tax prescribed upon the par value of all its shares, the building cannot be taxed for county purposes, although the cashier occupies a part of it as a residence. *County of Lancaster v. Lancaster County National Bank*, 415.
 15. *Of deposits — compelling exhibition of books.*] The officers of a National bank cannot be compelled to exhibit the books of the bank to State officers for the purpose of furnishing a basis for State taxation of the deposits as against the depositors. *First National Bank of Youngtown v. Hughes*, 176.
 16. *Double.*] A State may tax the real property or the capital stock of a National bank, but not both. *County Commissioners of Frederick County v. Farmers and Mechanics' National Bank of Frederick*, 253.
 17. *License.*] A city has no power to exact a license fee from a National bank. *City of Carthage v. First Nat. Bank of Carthage, Missouri*, 279.

TAXATION—Continued.

18. *Municipal — injunction of banking business.*] A National bank is not subject to local municipal taxation of its business, and the enforcement of such tax may be enjoined. *Mayor, etc., of Macon v. First National Bank of Macon*, 219.
 19. *Remedy for illegal.*] The assessment by a municipal corporation of a tax upon the shares of a National bank in gross, or upon its capital stock, is void, but the remedy is at law, and not by injunction, although the municipal corporation is insolvent. *National Commercial Bank of Mobile v. Mayor, etc., of Mobile*, 440.
 20. *Reserve surplus taxable.*] The surplus fund which a National bank is required to reserve from its net profits is not excluded in the valuation of its shares for taxation. *Strafford Nat. Bank v. Dover*, 296.
 21. *Action against bank for tax on stock.*] An assessment upon the capital stock of a National bank in gross is invalid, and a provision that the same "shall be paid by each such association for the shareholders thereof," being dependent upon such invalid provision, and incapable of independent enforcement, is also inoperative, and imposes no duty on the bank to pay such tax. *Sumter County v. National Bank of Gainesville*, 449.
 22. *Receiver.*] A tax levied on the property of a National bank subsequent to its insolvency is subordinate to the rights of a receiver appointed after such levy. *Woodward v. Ellsworth*, 216.
 23. *Of shares — remedy for illegal — constitutional law.*] A State statute, independent of and designed as a substitute for all other provisions for taxation, which permits any debtor, assessed upon personal property, to deduct the amount of his debts from the valuation of all his personal property, including money capital, except bank shares, is wholly unconstitutional and invalid as to National bank shares, and affords no authority for making any assessment upon such shares; and an injunction to restrain the enforcement of such tax will issue at the suit of a bank the shares of whose capital are thus illegally assessed against the shareholders. *National Exchange Bank v. Hills*, *456.
- Of circulating medium.*] See CONSTITUTIONAL LAW, 100, 489.

TRANSFER OF STOCK.

1. *Foreign executor.*] In the absence of any provision in the by-laws or articles of association of a National bank to the contrary, such a bank is bound under the laws of Pennsylvania to recognize a transfer of its stock by a foreign executor duly appointed in another State. *Hobbs v. Western Nat. Bank*, 187.
2. *Refusal of cashier to permit — limitation — payment of judgment for damages.*] B. having duly sold stock of a National bank of Louisiana pledged to him by A., applied to the cashier to have it transferred on the bank books, but the cashier refused, on the ground that A. was indebted to the bank. The bank having failed before the transfer could be enforced, B. brought an action of damages against the receiver. *Held*, (1) that the action was not barred by the statute of limitation of one year; (2) the cashier having

TRANSFER OF STOCK — *Continued.*

been intrusted by the directors with the duty of transferring the stock of the bank, his refusal was imputable to the bank ; (3) the court below had power to order the receiver to pay the claim, or certify it to the Comptroller. *Case, receiver of Crescent City Nat. Bank, v. Citizens' Bank of Louisiana*, 47.

3. *As security for loan.*] The transfer to a National bank, as security for a loan, of stock of a corporation whose property is solely real estate, is not invalid within the National Banking Act, as a loan upon a mortgage security. *Baldwin v. State Nat. Bank of Minneapolis*, 278.
- Colorable.*] See STOCKHOLDER, 25.

TRUSTEE.

1. *Exemption from personal liability, how to appear.*] A trustee, holding shares in a National bank, cannot avail himself of his exemption from personal liability for debts of the bank, unless his trusteeship appears on the books of the bank. *Davis v. Essex Baptist Society*, 110.
2. *Religious society holding stock bought with bequest.*] With a bequest of money a religious society purchased, and held in its own name, shares in a National bank. The society had other donations otherwise invested. *Held*, that the society was not a trustee, but an ordinary stockholder, and liable to assessment for debts of the insolvent bank. *Id.*

ULTRA VIRES.

1. *Bank acting as warehouseman — estoppel.*] A National bank, which has wrongfully converted to its own use the property of another, is estopped from denying its liability to account therefor upon the ground that it received and held the property in carrying on the business of a warehouseman outside the powers conferred by its charter. *German National Bank v. Meadowcroft*, 463.
2. —.] Forfeiture of the privileges and powers of a National bank must be determined, by a suit brought by the Comptroller of the Currency and until determined, it may do business ; and no person, by a conspiracy to evade its regulations, may escape liability for borrowed money loaned by it, upon personal security in the manner authorized. *Stephens v. Monongahela National Bank*, 398.
3. *Lending credit.*] Where a party knowingly takes as collateral security drafts of a National bank, drawn for the accommodation of a customer, he cannot recover in a suit against the bank in the hands of a receiver. *Johnston v. Charlottesville National Bank*, 199.
4. *Purchase by bank of its own stock.*] A National bank purchased some of its own stock, and divided it among some of its directors. One of the directors took some of the stock, giving his note for it, the bank retaining the certificate, but the stock being transferred to him on the bank books, and he receiving dividends on it. This director becoming bankrupt, he transferred the stock to the bank teller, the bank retaining his note. In an

ULTRA VIRES—*Continued.*

action by the assignee to set aside the transfer as a preference, *held*, that the bank had no power to purchase or convey the stock, and no title to it passed. *Meyers v. Valley National Bank*, 156.

See GUARANTY.

USURY.

1. *Interest on overdrafts.*] A National bank, by charging usurious interest on overdrafts upon it, loses the right to any interest. *Third National Bank of Philadelphia v. Miller*, 378.
2. *Note held as collateral for overdrafts.*] Where a note is held by a National bank as collateral for overdrafts upon it, and a suit is brought upon the note, the action, though nominally upon the note, is actually to recover those overdrafts as against the makers of the note as sureties. Such sureties are entitled, in case usurious interest has been charged, to defalcate all the interest charged as against the total amount of overdraft claimed. *Id.*
3. —.] The fact that the bank from whom an overdraft was due charged its customers usurious interest in the same transactions in which it agreed to pay usurious interest to the plaintiff, does not preclude a defense of usury by sureties for an overdraft. *Id.*
4. *Fraud on creditors.*] Neither under the National Banking Act nor the Pennsylvania Usury Act of 1858 is the taking of more than six per cent interest a fraud upon creditors in itself. *Appeal of Second National Bank of Titusville*, 364.
5. *General rate regulates right.*] The general rate of interest allowed in Pennsylvania to be taken by State banks is only six per cent. The establishment of a few banks authorized by special acts of assembly to take more than this amount is not sufficient to authorize National banks to take usurious interest under that clause of the National Bank Act allowing them to charge interest at the same rate as banks of issue organized under the laws of the State wherein the National bank is situate. *Gruber v. First National Bank of Clarion*, 382.
6. *State banks of issue.*] There are no State banks of issue in Pennsylvania authorized to charge interest at a greater rate than six per cent. A National bank cannot, therefore, claim such privilege. *First National Bank of Clarion v. Gruber*, 395.
7. *What is purging — extent of forfeiture.*] The knowingly taking or receiving, by a National bank, of a greater rate of interest than is lawful in the State where it is located is usurious under the National Banking Act, and the entire interest is forfeited, and the usury is not purged by settlements and renewal notes without additional usury. *Pickett v. Merchants' National Bank of Memphis*, 209.
8. *Interest after maturity.*] The receipt by a National bank of an usurious rate of interest upon the discount of a note works a forfeiture of inter-

USURY—*Continued.*

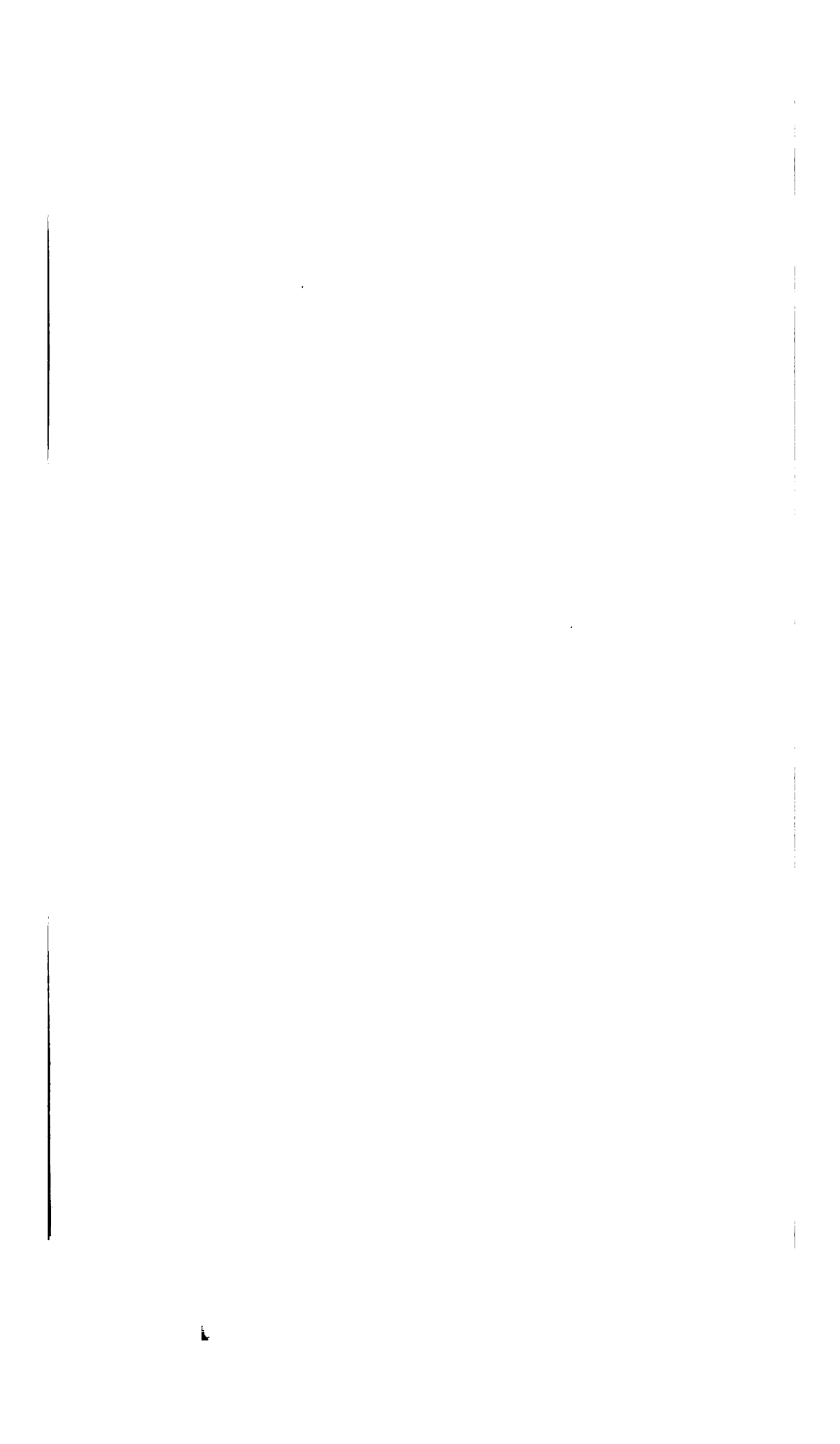
- est accruing after the maturity of the note as well as before maturity. *First National Bank of Uniontown v. Stauffer*, 178.
9. *Discounting business paper.*] A National bank, discounting business paper at a greater rate than seven per cent, is liable to the forfeiture of double the excess over seven per cent imposed by the National Banking Act, although the transaction is not usurious under the State law. *Johnson v. National Bank of Gloversville*, 802.
 10. *Effect of, on guaranty.*] A guaranty of negotiable paper discounted by a National bank is not rendered void by the fact that the bank demanded and received usurious interest upon the notes. *Lasear v. National Union Bank of Baltimore*, 261.
 11. *Who may recover.*] No one can recover usurious interest paid to a National bank but the party who paid it, and it cannot be set off or recouped by another party to the paper. *Ib.*
 12. *How recovered.*] Where illegal interest has been paid to a National bank upon the discount of negotiable paper, it cannot, in an action upon such paper, be applied by way of set-off or payment, nor can double the amount of such interest be allowed upon a counter-claim, but the party is restricted to his penal remedy. *Barnet v. Muhcie National Bank of Muncie, Indiana*, 18.
 13. —.] In no way, either by set-off or original action, can interest over the legal rate paid to a National bank be recovered, except by way of penalty, within two years, as prescribed by the National Bank Act. *First National Bank of Clarion v. Gruber*, 395.
 14. *Bill to recover.*] A bill in equity will not lie to recover usury from a National bank. *Hambright v. National Bank*, 419.
 15. *When a defense.*] Where a National bank lends money upon a usurious contract, and attempts to enforce such contract in a State court, the defendant may insist upon such usury as a defense. *National Bank of Winterset v. Eyre*, 234.
 16. *Jurisdiction of State courts to recover.*] State courts have jurisdiction in an action against a National bank to recover double the amount of usurious interest paid thereto. *Gruber v. First Nat. Bank of Clarion*, 382.
 17. —.] State courts have jurisdiction of actions against National banks for penalties and forfeiture prescribed by act of Congress for exacting usurious interest. *Hade, receiver, v. McVay*, 358.
 18. —.] State courts have jurisdiction of suits against National banks to recover money paid as usury. *Dow v. Frasburgh National Bank of Orleans*, 421.
 19. —.] State courts have jurisdiction of suits to recover such penalty. *First National Bank of Clarion v. Gruber*, 395.
 20. *Set-off—accommodation indorser.*] Under the National Bank Act, in an action upon a note usuriously discounted by a National bank, the amount of the usury may be set off by an accommodation indorser, although the

USURY—Continued.

- note does not carry interest on its face. *National Bank of Auburn v. Lewis*, 305.
21. *Renewals.*] Where there has been a series of renewals for the same loan, in a suit by the bank upon the last note, the borrower is entitled to a credit for all the interest paid on the loan from the beginning and not merely the excess above the lawful rate. *Stephens v. Monongahela Nat. Bank*, 398.
22. —.] In rendering judgment on a promissory note given to a National bank, in renewal, into which note illegal interest on the original note was incorporated, the whole interest of both notes will be disallowed. *Bank of Cadiz v. Stemmons*, 361.
23. *Loan to director — estoppel.*] Where a National bank makes to one of its directors a loan of money, which in amount and in the rate of interest is in contravention of the National Banking Act, the borrower is not estopped to defend against a recovery of interest. *Ib.*
24. *Payment.*] Payments made generally on a promissory note to a National bank, which note embraces illegal interest, will be applied in satisfaction of the principal. *Ib.*
- See* BANKRUPTCY, 138; JURISDICTION, 366; STATUTORY CONSTRUCTION, 35.

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